TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted]49.

THE SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY, PLAINTIFF IN [redacted],

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, THE WASHINGTON IMPROVEMENT AND DEVELOPMENT COMPANY, JOHN HUGHES, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED AUGUST 6, 1910.

(21,290.)

(21.290.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 225.

THE SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, THE WASHINGTON IMPROVEMENT AND DEVELOPMENT COMPANY, JOHN HUGHES, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 10, 1909.

1 In the Supreme Court of the State of Washington.

No. 6859.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Respondents (Plaintiff in Error),

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement & Development Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, E. Emmerson, Alexander Kellett, Charles Hayden, Appellants (Defendants in Error).

Præcipe.

To the Clerk of the above entitled Court:

You will please prepare and file in your office for transmission on the writ of Error and citation herein to the Supreme Court of the United States a transcript of the Record on file in this cause; such transcript to consist of the following specified papers, pleadings, judgements and exhibits findings and other filings, the same being all of said record relevant and necessary to a full and complete hearing and review of this cause, to-wit:

The Complaint, omitting the list of field notes as part of the description of the right-of-way in the complaint and attached to said complaint as exhibit "A"; the Amended Answer; the Reply; Temporary Injunction; the Findings of Fact and Conclusions of Law on behalf of the plaintiff; the Findings of Fact on behalf of the defendants; the Request for Additional Findings by plaintiff and Exceptions therewith; Decree; Notice of Appeal; Opinion and Judgment of the Supreme Court; Defendants' exhibit "8," being a deed of Assignment from Washington Improvement and Development Company to the Washington & Great Northern Railway

2 Company; Plaintiff's exhibit "C," being a notice of change of corporate name of the plaintiff from Republic & Kettle River Railway Company to that of Spokane & British Columbia Railway Company; also the letter of A. C. Tonner, Acting Commissioner Indian Affairs dated Washington, September 5th, 1901, and letter of E. H. Hitchcock, secretary of the Interior in answer to said letter dated Washington, October 15th, 1901, together with the certificate of F. E. Leupp, Commissioner of Indian Affairs thereto and marked as Plaintiff's Exhibit "BB"; also Plaintiff's exhibit "GG," consisting of letter from C. F. Larabee, acting Commissioner of Indian affairs to Secretary of the Interior, dated at Washington August 11, 1906, and letter of Thomas F. Ryan, acting secretary under date of Washington August 14th, 1906, and certificate of Commissioner of Indian affairs thereto; Plaintiff's exhibits "X" "Y," "Z," the same being three maps; all the testimony of S. H. Richardson, civil engineer, identifying exhibits "X" "Y" "Z," as such tes-

timony appears on pages 77 to 82 inclusive of the Statement of Facts. Also Petition for Writ of Error, Assignment of Errors, and Bond on Writ of Error.

WILLIAM T. BECK,
Attorney for Plaintiff in Error.

3 In the Superior Court of the State of Washington in and for Ferry County.

THE SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Development Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, E. Emmerson, Alexander Kellett, Charles Hayden, and all Their Agents, Employees, Attorneys and Councellors or Persons Acting under, by or Through Them or Either of Them, Defendants.

Complaint.

Plaintiff complains and for cause of action alleges:

I.

That it is now and has been during all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Washington and is now and for several years lats past has been the owner and engaged in the operating and maintenance of a line of Standard Guage Steam Railway from Grand Forks British Columbia, South to the city of Republic in Ferry County, Washington, a distance of forty miles more or less, and that it operates such road as a common carrier of passengers and freight; and that it is now engaged in the construction of an extension of its said line of railway south from the city of Republic to the city of Spokane, via the San Poil, Columbia and Spokane Rivers.

II.

That the defendant, The Washington and Great Northern Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Washington; That the Washington Improvement and Development company is a corporation organized and existing under and by virtue of the laws of the State of Washington.

III.

That plaintiff pursuant to the acts of Congress of March 3rd, 1875 and March 2nd, 1899, and the rules and regulations of the Department of the Interior thereunder, and in full compliance therewith, and in full compliance with the laws of the State of Washington, duly acquired the right-of-way upon and across the public lands of the United States and Indian Lands and through the South half of

the Colville Indian Reservation from Republic South to the City of Spokane, the route of which may be generally described as follows: Following The course of the San Poil River, South to the North line of the South half of the Colville Indian Reservation, thence following the course of the said river to a point on the Columbia River; thence along said Columbia River to the mouth of said Spokane River; thence along the general course of the Spokane River to the City of Spokane, State of Washington and that said right-of-way is and was during all the times herein mentioned surveyed and located and designated by marks and stakes upon the ground; and plaintiff further alleges that is has pursuant to the laws of the United
4 States and the laws of the State of Washington applicable thereto, heretofore surveyed and located a right-of-way for its proposed extension of its present road and is now the owner of the same and was such at all times herein mentioned and that said right of way strip, piece or parcel of land herein specially referred to is more particularly described as follows:

A strip or parcel of land 200 feet wide, being 100 feet in width on each side of the center line of said survey and location wherever the same crosses the public lands of the United States, and 100 feet in width, being 50 feet wide on each side of said center line as it crosses all lands other than public lands, and being 100 feet in width through the Colville Indian Reservation, said center line of said survey being particularly described as follows, to-wit: Beginning at Sta. 76x56.8 which lies North 310 feet from the West ¼ cor. sec. 1 Tp. 36 N. R. 32 E. W. M.; thence through said sec. 1 to Sta. 152x85, a point on the South side of said sec. 1, 300 feet West from the S. E. cor. said sec. 1. Thence through sec. 12 Tp. 36 N. R. 32 E. W. M. to sta. 160x18 a point on the East side of said sec. 12, 650 ft. south from the N. E. cor. of said sec. 12. Thence through sec. 7 Tp. 36 N. R. 32 E. W. M. to sta. 206x61.5 a point on the South side line of said sec. 7, 859.4 ft. east from the S. W. cor. of said sec. 7. Thence through sec. 18, tp. 36 N. R. 33 E. W. M. to sta. 264x30.3 a point on the South side of said sec. 18, 128.8 feet east from the S. W. cor. of said sec. 18. Thence through sec. 19 tp. 36 N. R. 33 E. W. M. to Sta. 283x75, a point on the West side of said sec. 19, 865 ft. north from the west ¼ cor. of said sec. 19. Thence through sec. 24 tp. 36 N. R. 32 E. W. M. to station 320x425, a point on South side of sec. 24, 347.4 ft. West from the S. E. cor. of said sec. 24; Thence through sec. 25, Tp. 36 N. R. 32 E. W. M. to sta. 329x34, a point on the East side of said sec. 25, 815 ft. South from the N. E. cor. of said sec. 25; thence through sec. 30 tp. 36 N. R. 33 E. W. M. to stat. 336x95, a point on the West side of sec. 30, 1160 ft. North from the West ¼ cor. of said sec. 30; Thence through sec. 25, tp. 36 N. R. 32 E. W. M. to sta. 378x67, a point on the south side of said sec. 25, 675 ft. West from S. E. cor. of said sec. 25; Thence through sec. 36 Tp. 36 N. R. 32 E. W. M. to sta. 436x30.5 a point on the South side of sec. 36, 101.8 ft. east from the south ¼ cor. of said sec. 36; Thence through sec. 1, Tp. 35 N. R. 32 E. W. M. to sta. 496x12.8, a point on the South side of said sec. 1, 1170.3 ft. east from the south ¼ cor. of said sec. 1; thence through sec 12,

tp. 35, N. R. 32 E. W. M. to sta. 560x52, a point on south side of said sec. 12.1085 ft. West from the S. E. cor. of said sec. 12; thence through sec. 13, tp. 35 N. R. 32 E. W. M. to sta. 584x78, a point on the east side of said sec. 13, 925 ft, north from the East ¼ cor. of said sec. 13, Thence through unsurveyed land to sta. 656x12 a point on the east side of said sec. 24 tp. 35 N. R. 32 E. W. M. 2345 ft. north from the S. E. cor. of said sec. 24; thence through sec. 24, tp. 35 N. R. 32 E. W. M. to sta. 678x23, a point on the east side of said sec. 24, 260 ft. North from the S. E. cor. of said sec. 24. Thence through unsurveyed land to sta. 689x97 a point on the east side of sec. 25 tp. 35 N. R. 32 E. W. M. 902 ft. south from the N. E. cor. of said sec. 25; thence through sec. 25 tp. 35 N. R. 32 E. W. M. to sta. 735x35, a point on the south side of sec. 25, 775 ft. west from the S. E. cor. of said sec. 25; thence through sec. 36 Tp. 35 N. R. 32 E. W. M. to sta. 763x37, a point on the east side of said sec. 36, 2640 ft. North from the S. E. cor. of said sec. 36. Thence through unsurveyed land to sta. 790x31, a point on the boundary line between the North and South half of the Colville Indian Reservation, 395 ft. east from the S. E. cor. of sec. 36 Tp. 35 N. R. 32 E. W. M.; Thence through the South Half of the Colville Indian Reservation to sta. 927x66 a point on the south side of the Dewey Placer Amend. Sur. #511, 727.8 ft. west from the S. E. cor. of said Dewey Placer claim, being a distance of fifty miles more or less.

5 III*a*.

That said strip of land or right-of-way is further located, fixed and described by the field notes of the survey thereof, attached to this complaint, marked 'A' and made a *a*part of this description and this complaint.

6 IV.

That the plaintiff is the owner of all said lands or right-of-way herein described and was such at all times mentioned herein and is now and was at all times herein mentioned in lawful possession thereof and is now engaged in the construction of its said line of railway over, upon and across the same in accordance with the survey of the same and the plaintiff alleges that it is duly authorized under the laws of the United States and the State of Washington to proceed with the construction of the said line of railway over, upon and across the aforesaid lands or right-of-way and that upon the construction of the same it is to be operated as a common carrier of passengers and freight.

V.

That after the plaintiff had so surveyed, located, staked and marked the ground of said railway line and right-of-way over and along said strip or parcel of land and after full compliance with the laws of the United States and the laws of the State of Washington in respect to the acquiring of right-of-way by the plaintiff, and while plaintiff was in possession thereof, the defendants by themselves, their agents and employees, entered upon said strip of land at various

points thereof and commenced chopping down trees and clearing same, digging holes, removing earth and stones therefrom and otherwise obstructing said groun- and right-of-way, so obstructing and interfering with plaintiff's work thereon, and have for many days last past continued in so obstructing and interfering with plaintiff's right-of-way and its work hereon and defendants threaten to build, construct and erect a road bed and railroad thereon and are now actually engaged in so doing and will so prevent the plaintiff from having the free and unobstructed use of said land and right-of-way and will unless prevented by immediate issuance of a restraining order from this court wholly deprive the plaintiff of the same and completely destroy its work thereon and prevent a continuance of the same and prevent plaintiff from constructing and completing its said line of railway thereon and thereby irreparably injure and damage this plaintiff.

VI.

That said defendants or either of them have no right, title or interest in said piece or parcel of land or right-of-way or any part thereof and in commencing the acts and doing the things hereinbefore complained of, the defendants have been and still are unlawfully trespassing upon the property and right-of-way of the plaintiff and thereby doing plaintiff irreparable injury and damage said entry and the acts and things herein complained of have been committed and done and are being done against the objections and in violation of the right of the plaintiff herein.

VII.

That the plaintiff has no speedy or adequate remedy at law and an emergency exists for the immediate issuance of a restraining order herein without notice to defendants; That unless a temporary restraining order be immediately issued without notice being given to said defendants of the application therefore, said defendants will continue to obstruct work upon said right-of-way and interfere with plaintiff in its possession and use of the same, and will accomplish the complete destruction of said right-of-way and render the same useless to the plaintiff and will inflect great and irreparable injury to the said property of the plaintiff for which no adequate compensation can be made.

7 Wherefore plaintiff says: 1st. That the Court issue a restraining order in this proceeding requiring the defendants, and each of them, their agents, employees, Contractors, sub-contractors, attorneys and councellors, and all persons acting under, by or through them, or either of them, to desist and refrain from entering upon said right-of-way, or strip or parcel of land, or any part thereof, or in any manner obstructing, destroying or interfering with the same, or with the plaintiffs, its employees, agents or servants in the free and uninter-upted use of said piece of land, right of way, roadbed, or any part thereof:

2nd. That the court fix a time and place for the hearing of the application of the plaintiff for a temporary injunction in this cause, should the defendants, or either of them demand a trial thereof, and

fix the amount of bond to be given by the plaintiff pending such hearing.

3rd. That upon said hearing the court grant a temporary injunction pending the trial of said case and that upon the hearing said injunction being made perpetual, that defendants herein and each of them, their agents, servants and employees, contractors, attorneys and councellors, and all persons acting by or through them or either of them, be perpetually enjoined and restrained from ever interfering with plaintiff's possession and enjoyment of said right-of-way or piece or parcel of land described in this complaint or with plaintiff or its agents, servants or employees in its completion of its railway line upon the same or in its free and unobstructed use of said piece or parcel of land; and for such other and further relief as to the Court may seem just.

W. T. BECK,
C. P. BENNETT,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Ferry, ss:

G. W. Fairweather being first duly sworn, deposes and says that he is an agent for the plaintiff corporation in the above entitled proceeding upon whome service of summons might be had for and on behalf of plaintiff corporation, and that he makes this verification for and on its behalf; That he has read the foregoing complaint and knows the contents thereof and believes the same to be true.

G. W. FAIRWEATHER.

Subscribed and sworn to before me this 17th day of July, 1906.

WILLIAM T. BECK,
Notary Public in and for the State of Washington,
Residing at Republic, Therein.

Endorsement: No. 599. Spokane & British Columbia Ry. Co., Plaintiff, vs. Washington & G't Nor. Ry. Co., et al., Defendants. Complaint. Summons. Filed this 1 day of May, 1907. J. C Caie, Clerk.

8 In the Superior Court of the State of Washington in and for the County of Ferry.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Developement Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, H. Emmerson, Alexander Kellett, Charles Hayden, and all Their Agents, Employees, Attorneys, and Counsellors or Persons Acting under, by or Through Them, or Either of Them, Defendants.

Amended Answer.

Come now the defendants and leave having been obtained file this their amended answer to the complaint of the plaintiff, and reserving to themselves all benefit of objections and exceptions to the plaintiff's complaint, on the ground that said complaint does not state a cause of action, nor facts to entitle the plaintiff to the relief therein prayed for, and saving and reserving to themselves all benefit of objections and exceptions to said complaint on account of the many errors and insufficiencies therein contained, says:

I.

For answer to the 1st paragraph of said complaint, defendants have no knowledge or information sufficient to enable them to form a belief as to the allegations therein contained, and therefore deny the same.

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II.

Defendants admit the 2nd paragraph of said complaint.

III.

For answer to the 3rd paragraph of said complaint, the defendants deny each and every allegation therein contained.

IV.

For answer to the 4th paragraph of said complaint the defendants deny each and every allegation therein contained.

V.

For answer to the 5th paragraph of said complaint the defendants say that they admit that the agents and employees of the Washington & Great Northern Railway Company entered upon the strip of land described in plaintiff's complaint, at some points thereof, and began clearing and excavating, and deny each and every other allegation in said paragraph contained.

VI.

The defendants deny each and every allegation contained in the 6th and 7th paragraphs of said complaint.

And for a further and affirmative defense, defendants say: That the Washington & Great Northern Railway Company is and was at all the times herein mentioned a corporation, organized and existing under the laws of the State of Washington, and so organized for the purpose, among others, of laying out, constructing, furnishing, equipping and operating a line of steam railway and electric telegraph lines from a point on the main line of the Great Northern Railway at Wenatchee, Chelan County, Washington, running thence northerly and north westerly through the counties of Chelan and Okanogan, to a point on the International Boundary Line, near Osoyoss Lake, and from a point on the last above described
10 line near the mouth of the Bonaparte River, in the county of Okanogan, in the State of Washington, running thence easterly and northerly to the town of Republic, in the County of Ferry, and State of Washington, upon the course and over the route hereinafter mentioned and described as being a part of the route described in the plaintiff's complaint in this action, reference to which is made, and which is made a part hereof, and for the purpose of and authorized to survey, locate, construct and complete, and at its pleasure alter, re-locate, re-construct and complete, use, maintain and operate, a railway, with one or more lines of rails, from Marcus, in the State of Washington, to a point on the International Boundary, between the State of Washington and British Columbia, and from another point on the International Boundary between the State of Washington and British Columbia, to Republic, in Ferry County, State of Washington, and to build, equip, maintain and operate branch railways and extensions of said railway from points on said railway to other points in the State of Washington and elsewhere; and said Washington and Great Northern Railway has for upwards of four (4) years owned and maintained and operated and will hereafter continue to own, maintain and operate a railway between said Marcus and said Republic upon the route mentioned, and is now conducting and will hereafter continue to conduct a general railway business as a common carrier of passengers and merchandise over said line of railway That said Washington Improvement and Developement Company is and was at all the times herein mentioned a corporation organized and existing under the laws of the State of Washington, and authorized to acquire and transfer property and do business in said State, and, on the 13th day of June, 1906, said Washington & Great Northern Railway Company duly adopted a resolution whereby it was "Resolved, That this company survey, locate, construct and operate a branch line of railway, com-
11 mencing at a connection in the existing railway of this company, at or near Republic, in the county of Ferry, State of Washington, and extending thence thr-u- said county of Ferry in a southerly and south easterly direction to a point on the north bank of the Columbia River, at or near Hell Gate in said Ferry County,

a distance of about fifty six (56) miles," which resolution was duly filed in the office of the Secretary of State for the State of Washington.

II.

That said defendant Washington & Great Northern Railway Company is and was at all the times in plaintiff's complaint mentioned, the owner and entitled to the possession of all of certain parts of the strip described in plaintiff's complaint, to which complaint reference is hereby made and the same is made a part hereof, the parts mentioned being all the parts of said strip contained within the south half of the north east quarter and the north east quarter of the south east quarter of Section One (1), Township Thirty-five (35) North of Range thirty-two (32), West of the Willamette Meridian, and contained within the east half of the south west quarter, and west half of the south east quarter of Section Twelve, and east half of the north east quarter of Section Thirteen (13), Township thirty-five (35), North of Range Thirty-two (32), East of the Willamette Meridian, and lying between the east line of the north east quarter of Section Twenty-four (24), in Township Thirty-five (35), north of Range thirty-two (32), East of the Willamette Meridian, and the north line of the south half of the Colville Indian Reservation, and all that part of said strip lying within the south half of said Colville Indian Reservation. That said title was acquired in the manner following:

By an Act of Congress, approved June, 4th, 1898, entitled "An Act granting to the Washington Improvement and Developement Company a right of way thr-u- the Colville Indian Reservation, in the State of Washington," there was granted to defendant,
12 Washington Improvement & Developement Company, and to its assigns, a right of way for its railway, telegraph and telephone lines, thr-u- the Colville Indian Reservation, in the State of Washington, beginning at a point on the Columbia River near the mouth of the San Poil River, running thence in a northerly direction to a point in Township thirty-seven (37) North of Range Thirty-Two (32), East, Willamette Meridian; thence northerly to a point near the mouth of Curlew Creek, and in said Act it was provided that said right of way should be fifty (50) feet in width on each side of the center line of said railroad, also ground adjacent to said railway for station buildings and for necessary side tracks and switch tracks, not to exceed in amount two hundred (200) feet in width and two thousand (2000) feet in length for each station, and to an extent not exceeding one (1) station for each ten miles of road within the limits of said Colville Indian Reservation, and it was provided in said Act that said company should cause maps showing the route of its located lines thr-u- said Colville Indian Reservation to be filed in the office of the Secretary of the Interior, and after the filing of the said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps should be valid as against said company. That pursuant to and in compliance with the provisions of said Act, said defendant, Washington Improvement & Developement Company filed in the office of the Secre-

tary of the Interior maps showing the route of its located line through said Colville Indian Reservation, which said maps were approved by the Secretary of the Interior on June 23rd, 1899, August 2nd, 1899, August —, 1899 and November 27th, 1899, respectively, reference to which maps so filed is hereby made for definite description of the route of said defendant Washington Improvement & Developement Company's located line, and which line as so shown upon said maps so filed *are* substantially the line described in plaintiff's complaint within the limits in this paragraph before mentioned, and all of which was at the time of the passage of said Act, and the filing and approval of said maps contained within the limits of the Colville Indian Reservation.

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III.

That long prior to any of the times herein mentioned, and long prior to any attempt on the part of the plaintiff to locate, survey or mark out a route for a railroad upon the premises described in its complaint, said defendant Washington Improvement & Developement Company had surveyed, located and marked out a route for its railway, as aforesaid, with the bone fide intention of locating, constructing, maintaining and operating a railway upon said route, as authorized and empowered by its articles of incorporation, and prior to the commencement of this action said Washington Improvement & Development Company had, for a valuable consideration, granted, assigned, quit claimed and transferred to the defendant Washington & Great Northern Railway Company, all "rights, privileges, immunities and property of every kind and nature," acquired by it, "under and by virtue of an Act of Congress, entitled "An Act granting to the Washington Improvement & Developement Company a right-of-way through the Colville Indian Reservation, in the State of Washington, approved June, 4th, 1898," and prior to the commencement of this action the defendant Washington & Great Northern Railway Company was engaged in the construction of a line of railway over the route aforesaid, and continued in the construction of said railway until prevented therefrom by the order of this court in this action.

IV.

That heretofore, and in the month of July, 1906, the plaintiff, disregarding the rights of the defendant Washington & Great Northern Railway Company, and disregarding the survey, route, and location of its said proposed line of railway, entered upon the premises of said defendant Washington & Great Northern Railway above described, and made surveys and set stakes, and on or about the 10th day of July, 1906, began chopping down trees and clearing the ground and digging holes and removing earth and stone, and otherwise interfering with, obstructing and trespassing upon the said premises of said Washington & Great Northern Railway Company, and said plaintiff, having procured a restraining order from this court enjoining and restraining said Washington & Great Northern Railway Company, its servants, agents and repre-

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sentatives from going upon, excavating or in any manner using its own property as aforesaid, is proceeding itself to cut timber from and make excavations upon and disfigure and damage said Washington & Great Northern Railway Company's property, to its great and irreparable injury and damage, and will continue so to do, and said defendant, Washington & Great Northern Railway Company has no speedy or adequate remedy at law.

V.

That plaintiff has no right, title or interest in any part of the said strip of land above described, but is unlawfully trespassing upon and committing waste upon said property.

Wherefore, the defendants pray that the plaintiff herein, its agents, employees, contractors, subcontractors, attorneys and counsellors, and all persons acting by or thr-u- it, or them, or either of them, be perpetually enjoined and restrained from ever interfering with the defendant, Washington & Great Northern Railways Company's possession and enjoyment of the parts of said strip above described, being all of said parts contained within the right of way granted by Act of Congress, as aforesaid, and shown by the maps filed in the office of the Secretary of the Interior, and from ever interfering with
15 said defendants or any of them, their agents, servants or employees in constructing, maintaining and operating a railway upon said right of way, and they and each and all of them be forever enjoined and restrained from asserting any title or claim of title, or claim of right of any kind to any part of the right of way of the defendant Washington & Great Northern Railway Company, as described in said map filed with the Secretary of the Interior as aforesaid, and for such other and further relief as may be just and equitable.

M. J. GORDON,
CHARLES A. MURRAY, AND
GEO. V. ALEXANDER,
Attorneys for Defendants.

STATE OF WASHINGTON,
County of Spokane, ss:

W. H. Fortier being first duly sworn deposes and says: That he is one of the officers of said defendant, Washington & Great Northern Railway Company, to-wit, its Auditor, and authorized to make this verification; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

W. H. FORTIER.

Subscribed and sworn to before me this 10th day of November, A. D., 1906.

W. W. KELLINGER,
Notary Public in and for the State of Washington, Residing at Spokane.

Endorsement: (599 Amended Answer.)

16 In the Superior Court of the State of Washington in and for Ferry County.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement & Developement Company, a Corporation; John Hughes, Patrick Welsh, Albert M. Anderson, H. Ennerson, Alexander Kellott, Charles Hayden, and all their Agents, Employees, Attorneys and Counsellors, or Persons Acting under, by or Through Them, or Either of Them, Defendants.

Reply.

Comes now the plaintiff and for reply to the "Further and Affirmative Defense" set up in the answer alleges:

I.

For reply to the first paragraph therein:

Plaintiff admits the allegation of the Incorporation of the Washington and Great Northern Railway Company, and the Washington Improvement & Developement Company; as to the allegation that such "were corporations during all the times mentioned therein" and as to all the residue of said paragraph plaintiff denies any knowledge or information thereof sufficient to form a belief.

II.

For reply to the second and third paragraphs, plaintiff denies each and every allegation therein.

III.

For reply to the fourth paragraph; plaintiff admits that it entered upon the premises described in said affirmative answer at some points thereof and began clearing and excavating, and admits the allegation as to procuring a restraining order against defend-
17 ants, their agents and servants, and denies each and every other allegation in said paragraph.

IV.

For reply to the fifth and sixth paragraphs, plaintiff denies each and every allegation therein.

W. T. BECK &
C. P. BENNETT,
Attorneys for Plaintiff, Republic, Washington.

STATE OF WASHINGTON,
County of Ferry, ss:

G. W. Fairweather, being first duly sworn deposes and says: That he is one of the officers of said plaintiff, the Spokane & British

Columbia Railway Company, to-wit: its Auditor, and authorized to make this verification; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

G. W. FAIRWEATHER.

Subscribed and sworn to before me this 28th day of August, 1906.

WILLIAM T. BECK,
Notary Public in and for the State of Washington,
Residing at Republic, Therein.

Endorsement: (599. Reply.)

18 In the Superior Court of the State of Washington in and for the County of Ferry.

No. 599.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al., Defendants.

This cause coming on to be heard by consent of parties on this 23rd day of July, 1906, upon the application of the plaintiff for a temporary injunction against the defendants, and also on the application of the defendants by their answer for a temporary injunction against the plaintiff, both parties being represented by counsel, and the court having considered the complaint of the plaintiff, and the answer of the defendant, and having heard the arguments of counsel, and being fully advised in the premises,

It is ordered that all parties to this action both plaintiff and defendants, and each of them are hereby enjoined, and their agents, employees, contractors, sub-contractors, attorneys and counsellors and all persons acting under them, or either of them, are enjoined from entering upon any part of the strip described in the complaint in this action and from doing any clearing, grading, or in any manner interfering or disturbing, or changing the physical condition of said premises or any part of said premises, or exercising any proprietory right as against one another with respect to said premises until the order of this court after a trial of said action shall have been had upon the merits, except that the defendants may enter upon said premises for the purpose of surveying and may set stakes and do anything properly incidental to surveying and the locating of the line for a railway but not to change the physical condition of said property or any part of it otherwise than is necessary in making the survey. This injunction, however, only to be in force in

19 favor of either party plaintiff or defendants and against the opposing party or parties upon the filing of a bond by the party in whose favor the injunction is to operate in the sum of Twenty-Five Hundred Dollars ($2500.) to be approved by the Clerk

of this Court, that is to say, the plaintiff shall file a bond in said sum to be so approved before this order shall be effective against the defendants and the defendants shall file a bond in said sum to be so approved, before this order shall be effective against the plaintiff.

Dated July, 23rd, 1906.

D. H. CAREY, *Judge.*

20 In the Superior Court of the State of Washington in and for Ferry County.

No. ——.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, a Corporation: The Washington Improvement and Developement Company, a Corporation; John Hughes, Patrick Welsh, Albert M. Anderson, E. Emmerson, Alexander Kellott, Charles Hayden, and all their Agents, Employees, Attorneys and Counsellors, or Persons Acting under, by or Through Them, or Either of Them, Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial, on the 14th day of November, 1906, plaintiff appearing by W. T. Beck and A. M. Craven and C. P. Bennett, its attorneys, and the defendants all appearing by Charles A. Murray and Thomas R. Benton, their attorneys, the court proceeded to hear the testimony of witnesses, and the documentary evidence adduced, and after hearing same, and the argument of counsel, the court took the cause under advisement, and now the court, having considered same, and being fully advised in the premises, makes the following

Findings of Fact.

I. That the plaintiff, the Spokane and British Columbia Railway Company, was at the time of the commencement of this action, and for several years prior thereto, and now is a corporation organized and existing under the laws of the State of Washington, and that it is now, and for several years last past has been, the owner of, and engaged in the operation and maintenance of a line of standard
21 gauge steam railway extending north from the city of Republic, in Ferry County, Washington, to the City of Grand Forks, in the Province of British Columbia, a distance of forty miles more or less, and that it has been, and is now, operating the same as a common carrier of passengers and freight.

II. That the defendants, The Washington Improvement and Developement Company and The Washington and Great Northern

Railway Company are corporations organized and existing under the laws of the State of Washington.

III. That plaintiff, in accordance with a resolution of its Board of Trustees and its Amended Articles of Incorporation, duly prepared and filed, as required by the laws of the United States and the State of Washington, and for the purpose of extending its aforesaid line of railway from Republic to the City of Spokane, in the State of Washington, did, during the winter of 1904 and 1905 and the summer of 1905, survey and locate the line or route of such extension and right-of-way therefor, such line and right of way being designated and fully shown upon the ground for the entire distance thereof by stakes, hubs and other marks upon the ground, such line and right-of-way being located and fixed as described and fully set forth in plaintiff's complaint, and that plaintiff pursuant to the Act of Congress of March 3rd, 1875, entitled "An act granting rights-of-way to railway companies through the Public Lands of the United States", and pursuant to the Act of Congress of March 2, 1899, entitled "An act granting rights-of-way to railway companies through any Indian Reservation in the United States and other Indian Lands", and the rules and regulations of the Department of the Interior thereunder, duly filed, with the Secretary of the Interior its Articles of Incorporation and proofs of organization thereunder, together with maps of its said survey of said line and right-of-way showing the survey and location of the same; the maps covering that portion of the line from Republic to what is now the south half of the Colville Indian Reservation and passing through public lands
22 of the United States, and being approved by the Secretary of the Interior pursuant to the Act of March 3, 1875, December 4, 1905, and duly filed in the General Land Office at Spokane Falls, Washington, and approved by the Register of the said Land Office December 15th, 1905, and the maps through said Colville Indian Reservation being duly approved by the Secretary of the Interior, October, 17, 1905 subject to the provisions of the said Act of March 2, 1899, and that plaintiff, prior to the commencement of this action, duly complied in all other respects with the provisions of the said Acts of March 3, 1875 and March 2, 1899, and with laws of the State of Washington applicable thereto, and did thereby acquire the said right-of-way in good faith and for the purpose of constructing, operating and maintaining thereon the proposed extension of its said line of railway, and that plaintiff now is, and was at the time of the commencement of this action, and ever since the approval of said maps, has been the owner of and entitled to the possession of said right-of-way, and was, at the time of the entry and acts of trespass of defendants, as stated in the complaint, in actual possession thereof and engaged in the construction of its said line of railway over and upon said right-of-way in accordance with its said survey, and as shown on its said maps and described in plaintiff's complaint, and that plaintiff was duly authorized under the laws of the United States and the State of Washington to proceed with the construction of said line of railway.

IV. That plaintiff, in April 1905, duly adopted, by a resolution of its Board of Trustees, at a regular meeting, the aforesaid surveys and maps of its said right-of-way as its definite location thereof.

V. That all the allegations of plaintiff's complaint are true.

23 VI. That the defendant The Washington Improvement & Development Company is the corporation named in the Act of Congress approved June 4, 1898, entitled "An Act granting to the Washington Improvement & Development Company a right-of-way through the Colville Indian Reservation in the State of Washington, and that said Washington Improvement and Development Company did, pursuant to said act, file in the office of the Secretary of the Interior maps showing the route of its located line through said Colville Indian Reservation and which maps were approved by the Secretary of the Interior on June 23, 1899, August 2, 1899, and November 29, 1899, respectively, such approval being made by the Secretary of the Interior subject to the conditions, restrictions and limitations of the said act, and such line or right-of-way, as shown on the said maps from Republic to the Columbia River is substantially the line and right-of-way claimed by and set forth in plaintiff's complaint.

VII. That said Washington Improvement and Development Company never commenced grading or other work, or any construction whatever upon said line or right-of-way shown by said maps, or on any part thereof, within six months after the filing and approval of said maps, as aforesaid, or at any time, nor did any of the defendants commence grading or other work on said line or right-of-way within six months after the filing and approval of said maps, or at all, until in July, 1906.

IX. That plaintiff has fully complied with all laws pertaining to the acquirement of its said right-of-way, and that the defendants entered upon plaintiff's said right-of-way at the points described in plaintiff's complaint, and commenced construction thereon, in July, 1906, by cutting of timber, by the making of excavations on

24 the same under a claim that they were the owners of said right-of-way, and entered upon the same for the purpose of erecting a railway thereon and in denial of the plaintiff's rights therein.

From the foregoing facts, the court makes the following

Conclusions of Law.

1. That plaintiff is the owner and rightfully in possession of said right-of-way at the time of the entry of defendants.

2. That defendants have no right or interest therein, and that the entry and acts done by them were such acts as would permanently and totally obstruct the plaintiff in the construction of its road, and the injury caused thereby could not be compensated for in damages.

3. That plaintiff is entitled to a decree quieting the title of plaintiff against the claims of all the defendants, respectively, and perpetually enjoining all and each of the defendants from in any man-

ner interfering with plaintiff in its right to the occupancy and use of said right-of-way.

Done in open court this 5th day of February, 1907.

D. H. CAREY,
Superior Judge.

Endorsement: No. 599. Spokane & B. C. Ry. Co., Plaintiff, vs. Washington & Great Northern Ry. Co. et al., Defendant-. Findings of Fact and Conclusions of Law.

25 In the Superior Court of the State of Washington in and for the County of Ferry.

No. 599.

SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al., Defendants.

Findings of Fact and Conclusions of Law Proposed by the Defendants.

This cause having come regularly on to be heard at Republic, said County, on the 14th day of November, 1906, the plaintiff appearing by its attorneys, W. T. Beck and A. M. Craven, and the defendants appearing by their attorneys, M. J. Gordon, Charles A. Murray and Thomas R. Benton, and the same having been tried to the Court and the Court having heard the evidence and the arguments of Counsel and being fully advised in the premises, makes following

Findings of Fact.

1.

That the defendant Washington Improvement & Development Company is, and was at all the times in the pleadings mentioned, a corporation organized and existing under the laws of the State of Washington and authorized to acquire and transfer property and do business in said State. That the Washington & Great Northern Railway is, and was at all the times in the pleadings mentioned, a corporation organized and existing under the laws of the State of Washington and was organized for the purpose of laying out, constructing, furnishing, equipping and operating a line of steam
26 railway from a point on the main line of the Great Northern Railway at Wenatchee, Chelan County, Washington: thence running northerly and northwesterly through the Counties of Chelan and Okanogan to a point on the international boundary line near Osoyoss Lake and from a point on the last above described line near

the mouth of the Bonaparte River in the County of Okanogan, in the State of Washington, running thence easterly and northerly to the town of Republic in the County of Ferry, in the State of Washington, upon the course and over the route hereinafter mentioned and described as being a part of the route described in the plaintiff's complaint in this action, reference to which is made, and authorized to survey, locate, construct and complete, and at its pleasure alter, relocate, resurvey and reconstruct, use, maintain and operate a railway, with one or more lines of rails, from Marcus in the State of Washington to a point on the international boundary between the State of Washington and British Columbia, and from another point on the international boundary between the State of Washington and British Columbia to Republic in Ferry County, Washington, and to complete, equip, maintain and operate branch railways and extensions of said railway from points on said railway to other points in said State of Washington and elsewhere, and said Washington and Great Northern Railway had for upwards of four (4) years prior to the commencement of this action, owned and maintained and operated and will hereafter continue to operate a railway between said Marcus and said Republic upon the route mentioned and is now conducting and will hereafter continue to conduct a general railway business as a common carrier of passengers and merchandise over said line of railway.

2.

That on the 13th day of June, 1906, said Washington and
27 Great Northern Railway Company duly adopted a resolution, whereby it was "Resolved that this Company survey, locate, construct and operate a branch line of railway, commencing at a connection in the existing railway of this company at or near Republic, in said County of Ferry, State of Washington, and extending thence through said County of Ferry in a southerly and southeasterly direction to a point on the north bank of the Columbia River at or near Hellgate in said Ferry County, a distance of about fifty-six (56) miles," which resolution was duly filed in the office of the Secretary of *the* State for the State of Washington.

3.

That by an Act of Congress, approved June 4, 1898, entitled "An Act granting to the Washington Improvement and Development Company a right of way through the Colville Indian Reservation in the State of Washington," there was granted to the defendant Washington Improvement & Development Company, and to its assigns, a right of way for its railway, telegraph and telephone lines, through the Colville Indian Reservation in the State of Washington, beginning at a point on the Columbia River near the mouth of the San Poil River, running thence in a northerly direction to a point in township thirty-seven (37) north of range thirty-two (32) East, Willamette Meridian; thence northerly to a point near the mouth of Curlew Creek, and in said Act it was provided, that said right of way should be fifty (50) feet in width on each side of the center line of said railroad. Also ground adjacent to said railway for sta-

tion buildings and for necessary side tracks and switch tracks, not to exceed in amount two hundred (200) feet in width and two thousand (2000) feet in length for each station, and to an extent not exceeding one station for each ten (10) miles of road within
28 the limits of said Colville Indian Reservation, and it was provided in said Act that said Company should cause maps, showing the route of its located lines through said Colville Indian Reservation, to be filed in the office of the Secretary of the Interior, and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps, should be valid as against said company. That pursuant to and in compliance with the provisions of said Act, said defendant Washington Improvement & Development Company filed in the office of the Secretary of Interior, maps showing the route of its located line through said Colville Indian Reservation which maps were approved by the Secretary of the Interior prior to November 27th, 1899, a copy of which map as filed and approved has been introduced in evidence and is on file among the records in this case, being defendants' Exhibit —— and reference to the same is hereby made for definite description of said Washington Improvement & Development Company's located line.

4.

That the plaintiff has surveyed and located a line for a railway in a large part upon the line granted as aforesaid to said Washington Improvement & Development Company and defined and described as aforesaid.

5.

That said defendant Washington Improvement & Development Company long prior to any attempt on the part of the plaintiff to locate, survey or mark out a route for the railroad upon the premises described in its complaint, located and marked out a route for its line as aforesaid, with the bona fide intention of locating, constructing, maintaining and operating a railway upon said route, and prior to the commencement of this action, said Washington Im-
29 provement & Development Company, for a valuable consideration, granted, assigned, quit claimed and transferred to the defendant Washington & Great Northern Railway Company, all rights, privileges, immunities and property of every kind and nature acquired by it under and by virtue of said Act of Congress, and prior to the commencement of this action, the defendant Washington & Great Northern Railway Company was engaged in the construction of a line of railway over the route granted to said Washington Improvement & Development Company as aforesaid, and transferred by it to said Washington & Great Northern Railway Company, and continued in the construction of said railway until prevented therefrom by the order of this Court in this action.

6.

That the plaintiff has undertaken to occupy a large part of said right of way claimed by said Washington & Great Northern Railway

Company as aforesaid and has gone upon said right of way and made surveys and set stakes; has chopped down trees and cleared ground; dug holes and removed earth and stone and has interfered with defendant Washington & Great Northern Railway Company and with the occupation and possession of the right of way described as aforesaid.

7.

That a map of the route and right of way claimed by the plaintiff was introduced in evidence and is on file in this case, marked plaintiff's exhibit ——. That a map showing in a large measure the conflict between the right of way claimed by the plaintiff and the right of way claimed by the defendant Washington & Great Northern Railway Company was introduced in evidence, is a part of the files in this case and is marked defendant's exhibit ——.

Dated Feb. 5, 1907.

D. H. CAREY, *Judge.*

Endorsement: No. 599. Spokane & British Columbia Railway a corporation, Plaintiff, vs. Washington & Great Northern Railway Company, a corporation et al. Findings of fact and conclusions of law By the defendants.

30 5869. Filed Jul- 23, 1907. C. S. Reinhart, Clerk.

In the Superior Court of the State of Washington in and for Ferry County.

No. 599.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Development Company, a Corporation; John Hughes, Patrick Welsh, Albert M. Anderson, E. Ennerson, Alexander Kellott, Charles Hayden, and All Their Agents, Employees, Attorneys and Counsellors, or Persons Acting under, by or Through Them, or Either of Them, Defendants.

Request for Additional Findings by the Plaintiff.

At the time of the signing the findings herein, the plaintiff requests the Court to make findings on the evidence offered by the plaintiff, to show that the two defendant corporations, if they ever had any rights under the Act of June 4th, 1898, abandoned same by acts showing an intention on the part of them to abandon same, and all intention to construct a railroad through the Colville Indian Reservation from Republic to the Columbia River, as follows:

I. That the two defendant corporations are practically one and the

same, both being at all times subsidiary corporations of the Great Northern Railway Company, and both controlled by it.

II. That both the defendant corporations, as early as January 1st, 1901, abandoned any rights which they, or either of them
31 might have had, by virtue of the Act of Congress of June 4th, 1898, and abandoned any intention to ever construct a railroad from Republic to the Columbia River.

The Court refuses to make the foregoing findings, or any findings on the evidence offered by plaintiff to show abandonment; to which refusal plaintiff takes the following exceptions:

I. Excepts to the refusal of the Court to make finding number one:

II. Excepts to the refusal of the Court to make finding number two:

III. Excepts to the refusal of the Court to make any findings upon the evidence specified in plaintiff's foregoing request.

Dated this 5th day of Feb. 1907.

D. H. CAREY,
Superior Judge.

Endorsement: No. 599. In the Superior Court for Ferry County State of Washington Spokane & B. C. Ry. Co. Plaintiff vs. Wash. and Gr't Nor. Ry. Co. Defendants Request for Add'l Findings Plaintiff and exceptions Filed this 7 day of July, 1907. W. T. Beck.

32 In the Superior Court of the State of Washington in and for Ferry County.

No. 599.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Development Company, a Corporation; John Hughes, Patrick Welsh, Albert M. Anderson, E. Emmerson, Alexander Kellott, Charles Hayden, and All Their Agents, Employees, Attorneys and Counsellors, or Persons Acting under, by or Through Them, or Either of Them, Defendants.

Decree.

This cause having been heard and tried, by the court, and the court having made its findings of fact and conclusions of law, and plaintiff now moving for a decree in accordance with said findings and conclusions:

It is considered, ordered, adjudged and decreed:

I. That plaintiff is the owner and entitled to the exclusive possession of the right-of-way mentioned and described in the com-

plaint, and that none of said defendants have any right, title or interest in same, or any part thereof.

II. That defendants, and their agents, servants and employés be, and they are, hereby perpetually enjoined from entering upon said right-of-way, or any part thereof, or in any manner interfering with the possession thereof by plaintiff, or with plaintiff's use thereof, and that plaintiff have its costs against defendants, taxed at $107.70.

Done in open court this 5th day of February, 1907.

D. J. CAREY, *Judge.*

Endorsement: 599. Decree.

33 In the Superior Court of the State of Washington in and for the County of Ferry.

No. 599.

SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

WASHINGTON & GREAT NORTHERN RAILWAY COMPANY et al., Defendants.

Notice of Appeal.

To the above named plaintiff and to William T. Beck and A. M. Craven and C. P. Bennett, its attorneys:

You and each of you will please take notice that the above named defendants appeal to the Supreme Court of the State of Washington from the Judgment and Decree rendered in favor of the plaintiff and against the defendants in the above entitled action on the 5th day of February 1907, wherein and whereby a perpetual injunction was granted against the defendants and the costs were awarded in favor of the plaintiff, and that said defendants appeal from the whole of said Judgment and Decree and each and every part thereof.

M. J. GORDON,
CHAS. A. MURRAY,
GEO. V. ALEXANDER,
THOS. R. BENTON,
Attorneys for Defendants.

Endorsement: 599. Notice of Appeal.

34 Filed April 13th, 1908.

No. 6859.

SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY, Respondent,

vs.

WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, Washington Improvement and Development Company et al., Appellants.

This was an action by plaintiff to enjoin defendants from interfearing with the use of a right of way for railway purposes through

the Colville Indian Reservation in this state. From a judgment and decree in favor of plaintiff the defendants appeal.

By an act of Congress approved June 4, 1898, there was granted to the appellant Washington Improvement and Development Company, and to its assigns, a right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation, beginning on the Columbia River near the mouth of the Sans Poil river, running thence northerly through said reservation toward the international line. There was also granted grounds adjacent for the purposes of stations, other buildings and side tracks, and switch tracks. The act provided for the filing of maps showing the route when determined upon, said maps of definite location to be approved by the secretary of the interior. These maps were subsequently filed, and were approved by the honorable secretary prior to November 27th 1899. Before the commencement of this action, the Washington Improvement & Development Company transferred all of its rights, privileges and immunities acquired under this act of Congress to the appellant Washington & Great Northern Railway Com-
35 pany. Since the filing and approval of the maps of definite location as aforesaid, this respondent, acting under authority of the act of Congress of March 3rd, 1875 and the act of Congress of March 2, 1899, located a route for its railway over practically the same line indicated by the maps filed by the Washington Improvement & Development Company, as aforesaid, and filed its maps with the secretary of the interior who approved the same on October 17, 1905. The act of June 4, 1898, under which appellants claim, contained the following provision:

"Provided, That when a map showing any portion of said railway company's located line is filed herein as provided for, said company shall commence grading said located line within six months thereafter or such location shall be void, and said location shall be approved by the secretary of the interior in sections of twenty-five miles before the construction of any such section shall be begun."

Section 5 of the statute reads as follows:

"That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this act."

Neither the Washington Improvement & Development Company nor its successor, the Washington & Great Northern Railway Company, commenced grading within six months after the approval of its maps of definite location, nor did it construct twenty-five miles of railroad, nor any, within two years after the passage of the act. For these reasons the respondent claims that appellant's location of the strip indicated by its maps became void and forfeited, and that respondent had a right to go upon the same strip of land and survey and locate its line of railway; that having surveyed and marked out its proposed line of railway upon substantially the same strip of ground after the expiration of the two years, and its said maps of location having been approved by the secretary of the interior, respondent claims that its location thereupon is

legal, and that appellants have no rights whatever in the
36 premises, and should be enjoined from in any manner interfering (which appellants were doing) with the respondent's use and occupancy thereof.

Appellants maintain that the provisions of the statute requiring the commencement of work within six months from the approval of maps of definite location and the construction of twenty-five miles of railroad within two years after the passage of the act were conditions subsequent, and that any breach or alleged breach of said conditions can be brought in question only by the government; that the respondent is not in a position to urge these matters, and cannot avail itself of any forfeiture on account of any such breach. It will be seen that the matters in issue are federal questions, and the determination thereof by this court must be made in the light of the decisions of the supreme court of the United States in so far as the latter apply thereto, and an examination convinces us that every question here raised is controlled by decisions heretofore made by that high court. In the light of those decisions we are led to the following conclusions:

The statute under which the Washington Improvement & Development Company located its line through this Indian reservation constituted a grant *in præsenti*. It was a "floating" grant until the company filed its map of definite location, and the same was approved by the secretary of the interior. The grant then became definite and fixed. It attached to the particular strip of land indicated by the map thus filed and approved, and the title to said premises became thereupon vested in the railway company. The provisions requiring the commencement of grading within six months and the construction of at least twenty-five miles of railroad within two years were conditions subsequent. Upon the failure of the railway company to comply with either of these conditions, the United States Government by a judicial proceeding or an act of Congress, or possibly by other appropriate proceedings equivalent to "office found," as known in the common law, could have declared a forfeiture and made a re-entry.

37 Until this should be done, the title remained in the railway company and could not be disturbed by respondent or any other third party. It was a matter between the appellants and the government. Had Congress therefore authorized the secretary of the interior or land department to declare forfeiture in cases of this kind, it is possible that the action of the secretary of the interior in approving the map of location filed by the respondent after the expiration of the two years, during which appellant should have commenced grading and should have constructed twenty-five miles of railroad, but did not, might be deemed to be a declaration of forfeiture and a re-entry on the part of the government. But no statute or authority of this character is called to our attention, and we are aware of none. It has been many times held by the United States supreme court, that the claiming of a forfeiture provided for in a land grant can only be made under authority of the legislative department, such as an act of Congress declaring or directing a forfeiture, or authorizing such to be made, or by a judicial proceeding by the

government, and that persons claiming under other provisions of the statute, such as the homestead or exemption laws, cannot urge a breach of conditions subsequent by the grantees. Among the many decisions of the United States supreme court bearing upon the matters herein discussed, we may call attention to the following:

In the case of Schulenberg v. Barriman, 21 Wall., 44, 62, 63, 64, that court, speaking by Mr. Justice Field, among other things said:

"The provisions in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. * * * And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down.

And the same doctrine obtains where the grant upon condi-
38 tion proceeds from the government; no individual can assail the title it *it* has conveyed on the ground that the grantee has failed to perform the conditions annexed. * * * In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In the case of Noble v. Union River Logging Railroad Company, 147 U. S., 165, 176, the court, speaking by Mr. Justice Brown, said:

"The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided and his approval was noted upon the plats, the first section of the act vested the right of way in the *rai*lroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory,' etc. The uniform rule of this court has been that such an act was a grant *in præsenti* of lands to be thereafter identified. Railway Company v. Alling, 99 U. S. 463. The *rai*lroad Company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. Moffat v. United States, 112 U. S. 24; United States v. Minor 114 U. S. 233. A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier,

in United States v. Stone, 2 Wall. 525, 535: One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.' Moore v. Robbins, 96 U. S. 530."

In Van Wyck v. Knevals, 106 U. S. 360, 366, 367, this language was employed:

"The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act 'definitely fixed,' and cannot be the subject of future change, so as to effect the grant, except upon legislative consent. No further action is required of the company to establish the route."

In Bybee v. Oregon & California R. Co., 139 U. S. 665, 675, 676, the court spoke as follows:

39 "An effort is made to distinguish this case from Schulenberg v. Harriman, in the fact that the act not only declares that the lands 'shall revert to the United States', but that the act itself 'shall be null and void', from which it is argued that it was the intention of Congress that the failure to complete the road should operate *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. It is true that the language of this statute differs somewhat from that ordinarily employed by Congress in connection with similar grants; but the declaration that the lands 'shall revert to the United States', is practically equivalent to a declaration that the act granting such lands shall cease to be operative if the company fail to complete its road within a specified time. * * *."

In Grinnell v. Railroad Company, 103 U. S. 739, 744, the court, speaking through Mr. Justice Miller, used this language:

"Another point equally fatal to the plaintiffs in error is, that the assertion of a right by the United States to the lands in controversy was wholly a matter between the government and the railroad company, or its grantors. The *legal* title remains where it was placed before the act of 1864. If the government desires to be reinvested with it, it must be done by some judicial proceeding, or by some act of the government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the government itself can only assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the government."

In St. Louis etc. Ry. Co., v. McGee, 115 U. S. 469, 473, 474, the court, speaking through Mr. Chief Justice Waite, spoke as follows:

"It has often been decided that the lands granted by Congress to aid in the construction of railroads do not revert after condition

broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action, legally equivalent to a judgment of office found at common law. United States v. Repentingny, 5 Wall. 211, 267, 268; Schulenberger v. Harriman, 21 Wall. 44, 63; Farnsworth v. Minnesota & Pacific Railroad Co., 92 U. S. 49, 66; M'Micken v. United States, 97, U. S. 217, 218; Van Wyck v. Knevals, 106 U. S. 360. Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to *e*b*force a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

In the case of United States v. Repentigny 5 Wall. 211, 267, 268, Mr. Justice Nelson, speaking for the court, said this:

"* * * we agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the government."

39½ We think it will be readily seen that the foregoing decisions leave us no discretion in the matter, but conclusively determine the issues in this case adversely to respondent's contention and to the conclusions reached by the honorable trial court.

The judgment and decree appealed from will therefore be reversed and the cause remanded with instructions to enter a judgment and decree in favor of appellants.

ROOT, *J.*

We concur:

HADLEY, *C. J.*
FULLERTON, *J.*
CROW, *J.*
RUDKIN, *J.*
MOUNT, *J.*

40 In the Supreme Court of the State of Washington, May Session, A. D. 1908.

Be it remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of May, A. D. 1908, it being the Eleventh day of said month, among other, the following was had and done, to-wit: Monday, May, 18th, 1908.

No. 6859.

SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, Respondent,
vs.
WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, WASHINGTON Improvement & Development Company, Appellants.

Judgement.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Ferry County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 18th day of May, A. D. 1908 on motion of M. J. Gordon Esquire, of counsel for appellants, considered adjudged and decreed, that the judgement of the said Superior Court be, and the same is, hereby reversed with costs; and that the said Washington & Great Northern Railway Company et al. have and recover of and from the said Spokane & British Columbia Railway Company the costs of this action taxed and allowed at Sixty-five and 55/100 Dollars, and that execution issue therefor.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

41 6859. Filed July 23, 1907. C. S. Reinhart, Clerk.

Indenture, Made this twentieth day of July, 1906, between the Washington Improvement and Development Company, a corporation of the State of Washington, party of the first part, and the Washington & Great Northern Railway Company, a corporation of said state, party of the second part, Witnesseth:

The party of the first part, in consideration of the sum of One Dollar ($1.00) to it in hand paid by the party of the second part, the receipt and sufficiency whereof is hereby acknowledged, has granted, assigned, quit-claimed and transferred, and does hereby grant, assign, quit-claim and transfer unto the party of the second part, its successors and assigns, forever, all the rights, privileges, immunities and property of every name and nature acquired by the party of the first part under and by virtue of an act of Congress entitled, "An Act granting to the Washington Improvement and Development Company a right-of-way through the Colville Indian Reservation in the State of Washington," approved June 4, 1898, and the filing of maps as in said act provided and the approval of said maps by the Secretary of the Interior, in and to or in connection with a right-of-way through and over the Colville Indian Reservation in the State of Washington, beginning at a point on the Columbia River near the mouth of the San Poil River; running thence in a northerly direction to a point in Township Thirty-seven (37) North of Range Thirty-two (32) East, Willamette Meridian; thence northerly to a point near the mouth of the Curlew Creek; thence

northerly to the international boundary line between British
42 Columbia and the State of Washington.

The maps filed by the party of the first part under said act of Congress were four in number, each covering a section of twenty-five (25) miles of said right-of-way, and were approved by the Secretary of the Interior as follows: June 23rd, 1899; August 2nd, 1899; August —, 1899; November 27th, 1899.

In witness whereof, the party of the first part has caused this indenture to be executed the day and year first above written.

WASHINGTON IMPROVEMENT AND DEVELOPMENT COMPANY,
By JAS. J. HILL.

In Presence of:

M. R. BROWN.
WM. R. BEGG.

Attest:

[SEAL.] F. W. BOBBETT, *Sec'ty.*

43 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 20 day of July, 1906, before me a notary public within and for said County and State, personally came, Jas. J. Hill and F. W. Bobbett, both to me personally known, and they being by me duly sworn, did each depose and say that the said Jas. J. Hill is the President, and the said F. W. Bobbett is the Secretary of the Washington Improvement and Development Company, the corporation described in the foregoing instrument as party of the first part thereto; that the seal affixed to said instrument as the corporate seal of said Company is such corporate seal and was affixed thereto by authority of said Company and its Board of Directors; and that they respectively subscribed the said instrument, the former as President and the latter as Secretary of said company, by like authority. And the said Jas. J. Hill President, and F. W. Bobbett, Secretary, as aforesaid, to me well known to be such President and Secretary, acknowledged the execution of said instrument as the free act and deed of said Company, and that the said corporation executed the same.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal the day and year above in this certificate written.

[NOTARIAL SEAL.] W. L. CLIFT,
Notary Public, Ramsey Co., Minn.

My commission expires Aug. 12, 1911.

Indorsed: Def't's Ex. 8.

44 No. 6859. Filed Jul- 23, 1907. C. S. Reinhart, Clerk.

No. 17057.

In the Matter of the Change of Name of THE REPUBLIC & KETTLE RIVER RAILWAY COMPANY, a Corporation.

Notice.

Notice is hereby given that the Republic & Kettle River Railway Company, a corporation, has changed its corporate name from that of Republic & Kettle River Railway Company, to that of Spokane & British Columbia Railway Company and that supplemental Articles making such change of name have been filed in the office of the Secretary of State and in the Office of the County Auditor of Ferry County, Washington.

W. T. BECK,
President of the Spokane & British Columbia Railway Company, Formerly the Republic and Kettle River Railway Company.

Filed for record at the request of W. T. Beck, August 2nd, 1905 at 11:30 A. M., and recorded August 3rd, 1905.

THOS. F. BARRETT,
County Auditor.
W. F. PAGE, *Deputy.*

Recorded Page 472 Book 2 of Miscellaneous Records.

Indorsed: Pltf's Ex. C.

45 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *September* 5, 1901.

Land.
44,720 46,572
46,573 46,796
48,458 –1901.

The Honorable the Secretary of the Interior.

SIR: I have the honor to transmit, herewith, maps of definite location showing the line of route of the Washington and Great Northern Railway Company through the north half of the Colville Indian Reservation, in the State of Washington, as follows:

1. From a point on the located line of said Company's road on the west line of Section 20, Township 38, north, range 37 east, which point is 17-14/100 miles southerly from the intersection of, said road with the international boundary line, to a point on the northerly bank of Columbia River in lot 12, section 26, township 37 north, range 37 east, Willamette Meridian, a distance of 26-71/100 miles

from the international boundary line, and a distance of 9-67/100 miles from the point of beginning above named.

2. From a point on the international boundary line, which point is 1340 feet east from the center of Kettle River, to a point on the east line of Section 36, Township 39 north, range 33 east, a distance of 14-33/100 miles.

3. From the point last named to a point in unsurveyed land designated as station "Zero," which point is 3300 feet south and 4436 feet west from the southwest corner of section 31, township 37 north, range 33 east, Willamette Meridian, a distance of 16-73/100 miles.

The said maps were filed in this office August 13, 1901, by Thomas R. Benton, attorney of said company, for approval by the Secretary of the Interior under the provisions of the Act of Congress approved March 2, 1889, (30 Stats. 990), in so far as the lines shown thereon cross Indian lands.

It is stated by Mr. Benton in his said letter that the lines shown on these maps form a part of a continuous line of railroad commencing at the Columbia River opposite the town of Marcus, in the State of Washington, where it connects with the Spokane Falls and Northern Railway by a bridge across said river and extending thence northerly along the Kettle River to a point on the interna-
46 tional boundary where it connects with the railway of the Vancouver, Victoria and Eastern Railway and Navigation Company, which railway extends westerly along said Kettle River to the international boundary line where it connects with the proposed railway of the Washington and Great Northern Railway Company, the line of which last named company extends thence southerly to the town of Republic.

Accompanying the maps of definite location are proofs of service of notice of the Washington and Great Northern Railway Company's application for right of way upon each of the several Indians whose allotments are crossed by the proposed railway line. The proofs also show service upon the Indian allottees, severally, of so much of the map of definite locations as shows the railway line across their respective allotments.

It is further stated in the said letter of Mr. Benton that it is the intention of the Washington and Great Northern Railway Company to complete the construction of the entire line from its connection with the Spokane Falls and Northern Railway at Marcus, to the town of Republic, during the present season, and that contracts for the construction have been made and the contractors are prepared to commence construction work at one.

Reporting hereon the Department is informed that on July 13, 1901, the Secretary of the Interior authorized the Washington and Great Northern Railway Company to survey and locate a line of railroad over Indian Lands in the northern half of the Colville Indian reservation, along a route similar to that shown on the maps of definite location transmitted herewith.

47 In Office letter dated July 18, 1901, addressed to the attorney of the said railway company advising relative to the authority granted by the Department July 13, the company was

informed that this authority extended only to the survey and location of the line of road and that construction work should not be commenced until after maps of definite location had been submitted to and approved by the Secretary of the Interior.

Under date of July 22, 1901, U. S. Indian Agent Anderson, of the Colville Agency, wired this office for instructions, stating that the Washington and Great Northern Railway Company had commenced the construction of its line of road on Indian lands in the Colville Indian reservation. This telegram was referred to the Department by the office in a letter dated July 25, 1901, and by Department letter dated July 26, 1901, the office was directed to instruct Agent Anderson to prevent any work on the said line of road until authority had been obtained to commence the same.

Agent Anderson was advised in accordance with departmental directions by telegram dated July 29, 1901, and the attorney for the railroad company was similarly advised by letter dated July 30, 1901.

Under date of August 3, 1901, the attorney for said company, replying to office letter dated July 30, 1901, stated that the company had directed that construction work on Indian lands be stopped.

Under date of August 28, 1901, the Department referred to this office a telegram from W. C. Morris, General Counsel of the Republic and Kettle River Railroad Company, dated August 27, 1901, stating that he had notified Agent Anderson that the Washington and Great Northern Railroad was grading on the Republic and Kettle River Railroad Company's right of way on the David
48 Herron and Desertelle allotments.

Under date of August 29, 1901, this office wired Agent Anderson that he should proceed to stop construction work by the Washington and Great Northern Railway through the Indian lands of Herron and Desertelle.

By telegram dated August 31, 1901, the office was advised by Agent Anderson that he would immediately proceed to stop construction work by the said company through the Indian lands named.

The Department is further informed that subsequent to the filing of maps of definite location by the Washington and Great Northern Railway Company this office advised Mr. W. G. Boland, the legal representative of the Republic and Kettle River Railroad Company, at Toronto, Canada, that such maps had been filed in this office, and that a reasonable time would be allowed him to make any statement he desired to make in the matter.

Mr. Boland was also notified, under date of August 13, 1901, that permission had been granted the Washington and Great Northern Railway Company to make a survey and locate a line of road along a route nearly identical with the line as shown upon the approved maps of definite location of the Republic and Kettle River Railway Company and that a reasonable time would be given the said company to oppose the approval of the maps of definite location when the same should be submitted for departmental action.

Formal protest was filed by Mr. Boland under date of August 23, 1901, which is transmitted, herewith, in which is reviewed the negotiations leading to the purchase of the charter and other property of the Republic and Kettle River Railway Company by
49 the incorporators of the Republic and Grand Forks Railway Company, and in which it is stated that the reason for purchasing the charter of the Republic and Kettle River Company was because the incorporators of the Republic and Grand Forks Railway Company were led to believe that only one road would be permitted to build into the Republic Mining Camp, and that as the former company was prior in point of time such permit would be granted to it and that the company prior in point of time would have the first right to proceed; that acting on this supposition the incorporators of said company have made all necessary financial arrangements for the completion of its line of railroad and have expended in work of construction and other necessary work in the neighborhood of $100,000 and have also made themselves liable on contracts for at least $200,000 more; that it was only about the beginning of the present month that the Railway Company known as the Republic and Kettle River Railway Company were permitted to proceed with the work of construction of the said railroad, and since receipt of such notice from the Department under date of a letter dated July 27th every effort has been made to push the work of completion as rapidly as possible, and a contract has already been awarded for the grading and bridge and other work other than the actual rails and also including the laying of the said rails, ties, etc., and the said company are now endeavoring to make a contract for the supplying of the said rails, and that this is the only contract yet to be awarded in order to complete the said railroad; that myself and my associates are acting in good faith and intend to complete the said line of railroad as early as possible that we have already obtained a charter from the Province of British Columbia
50 and from the Dominion of Canada and have given security at Victoria for the completion of the said road; that I have made diligent and careful inquiries from railway men who have a special knowledge of districts such as that to be supplied by the proposed line of railroad, and from my own knowledge and from what I have acquired in discussing the matter with representative men in and about the district in question, I am satisfied that one line of railroad will answer the purpose of such district for many years to come."

Accompanying said protest is a petition in the form of an affidavit, by T. P. Coffee, Vice President of the Republic and Kettle River Railway Company, setting forth in detail the operations of said company in the matter of the construction of its proposed line of railroad, and closing with the request that no maps or locations will be approved of showing a line of railroad running parallel to the line approved by the Department as the line of the Republic and Kettle River Railway.

The petition and protest are dated at Toronto, Canada, August 22, 1901.

On September 4, 1901, Mr. W. J. Boland, attorney for the Republic and Kettle River Railway Company, personally presented to this office an affidavit in which it is stated, among other things as follows:

"This deponent has searched the papers on file in the proper department in Washington and says that the maps of the Washington and Great Northern Railway, filed by its attorney, Thomas R. Benton, shows almost an identical line as that shown on the maps of the Republic & Kettle River Railway, which have already been approved of and the proposed line by the Washington & Great Northern crosses, recrosses and parallels within ten miles the line of
51 the Republic & Kettle River Railway and the one objective point to be reached is the Republic Mining Camp, and in the opinion of this deponent after careful inquiries the territory adjacent to and to be served by such railway will not serve two railroads and one railroad is sufficient for many years to come. The proposed railway by the Washington and Great Northern Railway, as appears from the plans on file, crosses or is coincident with the Republic and Kettle River Railway in places shown on such map as being allotments to Indians in at least seventeen of such allotments, besides which it also appears to cross or is coincident with the Republic & Kettle River Railway in at least two places in the public domain."

It is further stated in the affidavit of Mr. Boland that if the maps of definite location of the Washington and Great Northern Railway are approved; it will mean an immense loss to both railways and particularly to the Republic & Kettle River Railway Company, which company has proceeded with diligence and in good faith to complete the railway for which permission was granted immediately on the obtaining of such permit.

The Republic and Kettle River Railway Company was authorized to construct its line of road under the provisions of the Act of Congress approved March 2, 1899, (30 Stats. 990), and permission was granted the Washington and Great Northern Railway Company to survey and locate its line of railroad under the provisions of the same act.

It is provided in section one of said act "that where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interests will be promoted thereby."

52 In office letter dated July 10, 1901, transmitting the application of the Washington and Great Northern Railway Company for permission to survey a line of road along the route described in its said application, it was stated that it was not thought that permission should be granted the Washington and Great Northern Railway Company to survey a line of railroad that would parallel the locating line of the Republic and Kettle River Railway Company unless it should be shown to the satisfaction of the Secretary of the Interior that the "public interests will be promoted thereby."

It is thought the provision of section one, above quoted, applies particularly to the case under consideration and that this legislation was intended to secure to any company proceeding in good faith to construct a line of road under the provisions of this act, freedom from interruption or interference by another company and that the clause contained in said provision "unless, in his opinion, public interests will be promoted thereby" provides a means whereby a railroad company not acting in good faith may be prevented from holding for speculation a valuable franchise to the exclusion of a company proceeding with bona fide intentions.

A comparison of the maps of definite location, transmitted herewith, and described in paragraphs 2 and 3, with the map of definite location of the Republic and Kettle River Railway Company approved April 23, 1901, shows that the first mentioned lines cross and recross and parallel within a few feet the approved line of said Republic and Kettle River Railway in such a manner, it appears to this office, as to make it impracticable to construct both lines of railroad.

53 The Republic and Kettle River Railway Company has paid to the Indian allottees over whose lands its line of road extends for right of way, the sum of $5,548.05. It is shown in the affidavits, petitions and papers protesting against the approval of the maps of definite location of the Washington and Great Northern, submitted by the attorney of said Republic and Kettle Railway Company, that said company has expended a large amount of money in purchasing the franchise from the former incorporators of the company and also in operations for constructing the line and it appears that this company is acting in good faith and honestly intends to construct the line of road for which it has acquired a right of way, and that it is entitled, therefore, to the protection afforded by the provision of section one above quoted.

The protest and papers, herein referred to, together with the maps of definite location, and the communication submitting the same, are enclosed, herewith, and it is recommended, in view of the statements contained in the several affidavits and the representations made by the protestant—the Republic and Kettle Railway—that the Washington and Great Northern Railway Company should be required to furnish more satisfactory evidence that the public interests will be promoted by the construction of its line of road, as shown on the maps described in paragraphs 2 and 3, before its maps of definite location are approved.

In this connection attention is particularly invited to the fact that this company has proceeded with the construction of its line of road without having secured proper authority therefor, and apparently in defiance of the expressed wishes of the Department in the matter.

54 This action upon the part of the railroad company has caused the office considerable annoyance and required it to send an agent on a long trip of 150 miles, consuming seven days in order to prevent it from violating the law.

With reference to the map of definite location described in para-

graph one, from the town of Marcus northerly to a point near the international boundary line, over which there is no conflict with the Republic and Kettle River Railway Company, it is respectfully recommended that the same be approved, subject to the provisions of the Act of Congress of March 2, 1899, and subject, also, to all prior valid existing rights and adverse claims.

Very respectfully, your obedient servant,

A. C. TONNER,
Acting Commissioner.

C. F. H. (P.)

55 7359-1901.
Ind. Div.
W. J. D.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 15, 1901.

The Commissioner of Indian Affairs.

SIR: I have considered the matter of the protest by the Republic and Kettle River Railway Company against the approval of certain maps of location, filed by the Washington and Great Northern Railway Company, upon which is the line of its proposed road across certain Indian allotments in the north half of the late Colville Indian Reservation in the State of Washington.

Three separate maps of location, filed by the Washington and Great Northern Railway Company for approval under the act of March 2, 1899 (30 Stat., 990), were submitted with your office letter, dated September 5, last, in which you report that the located line shown upon two of said maps crosses, recrosses and parallels, the line of location of the Republic and Kettle River Railway Company, shown upon maps of location filed by the last-mentioned company under the act of March 2, 1899, *supra*, and approved April 23 last. You therefore recommend that the Washington and Great Northern Railway Company be required to furnish satisfactory evidence that public interest will be promoted by the construction of its line of road as shown upon these two maps, before the same are approved. There appears to be no objection to the other map, and you recommend that the same be approved.

The Republic and Kettle River Company has made due payment to the Indian allottees, over whose lands its proposed line of road extends, and said company claims to have spent large sums of money in grading and other work preliminary to the actual operation of its road along the line as shown upon the maps approved
56 by this Department, and that company urges that, on account of the topography of the country traversed by these proposed lines of road and the narrow valleys through which they must follow the water courses it is impracticable to build more than one line of road in that vicinity, and for that reason asks that the approval of the Department be not given to the maps of location filed by the Washington and Great Northern Railway Company.

Section 6 of the act of March 2, 1899, *supra*, under which each

of these companies is claiming a right of way over these Indian allotments, provides:

That the provisions of section two of the Act of March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," are hereby extended and made applicable to rights of way granted under this Act and to railroad companies obtaining such rights of way.

Section 2 of the Act of March 3, 1875, is as follows:

That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expense shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

From a careful consideration of these statutes, I am of opinion that, where the proposed line of road crosses an Indian allotment, the approval of this Department under the provisions of the act of March 2, 1899, *supra*, is necessary to the acquirement of a right of way over the same, and to the privilege granted by the act of March 3, 1875, supra, to use such a right in common with another company.

It satisfactorily appears that public interests will be promoted by the construction and operation of the line of the Wash-
57 ington and Great Northern Railway Company, as shown on its maps of located road under consideration, and I have therefore approved the same, subject to the rights of the Republic and Kettle River Railway Company under the act of March 2, 1899, and section 2 of the act of March 3, 1875. This will protect the Republic and Kettle River Company in its existing rights and will enable the Washington and Great Northern Company in constructing and operating its proposed line of road to obtain the privileges or benefits extended by section two of the act of 1875.

As thus approved, the maps are herewith returned, together with the papers.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

58 6859. Filed Jul- 23, 1907. C. S. Reinhart, Clerk.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *August 25th*, 1906.

I, F. E. Leupp, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of the originals as the same appear on file or of record in this Office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, on the day and year first above written.

F. E. LEUPP,
Commissioner.

[SEAL.]

Indorsed: Pl'tff's Ex. B. B.

59 Land.
6887–1906.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *August* 11, 1906.

The Honorable the Secretary of the Interior.

SIR: I have the honor to transmit herewith a telegram from Mr. Thomas R. Benton, attorney for the Great Northern Railway line, dated at St. Paul, August 10, 1906, as follows:

"During year eighteen ninety-nine Secretary Interior approved maps Washington Improvement & Development Company across Colville Reservation, from Curley Lake, down San Poil River to Columbia River, under act June fourth, eighteen nine'-eight. Development Company has conveyed its rights to Washington & Great Northern Railway Company. Latter company is involved in litigation with Spokane & British Columbia Railway Company to determine whether grant of June fourth ninety-eight is still in existence, and for purpose of said litigation is retracing original line of Development Company. Agent Webster, Colville Reservation, has notified our Engineers to stop this work, and has threatened to remove them from Reservation. Rights granted by Act eighteen ninety-eight are still in force, and we are simply retracing line approved under that Act. Please wire Webster soon as possible that we are authorized to do so. Answer by wire."

Reporting thereon you are advised that on October 4, 1900, the Office transmitted the application of the Republic & Kettle River Railway Company, the predecessor of the Spokane & British Columbia Railway Company, for right of way through the Colville Indian Reservation as then existing. At the time of transmitting this application it was reported that the Washington Improvement and Development Company had been granted a right of way for the construction of a railway, telegraph and telephone line through the Colville Indian Reservation, in the State of Washington, by Act of Congress approved June 4, 1898, (30 Stats. 430), a description of

the route being furnished. It was also reported that maps of definite location of that Company's line of route through the
60 Reservation along the valleys of the Sans Poil River, Sans Poil Creek, Curley Lake and Creek, and the Kettle River, had been approved by the Department June 23, August 2, and November 27, 1899; also that the application of the Republic & Kettle River Railway Company was thought to conflict with the approved location of the Washington Improvement and Development Company throughout the north half of its location, from a point near the town of Republic to the International Boundary line. There was also transmitted with this report a telegram from the then Indian Agent in charge of the Colville Agency, dated September 25, 1900, in reply to Office inquiry of September 15, as follows:

"Your telegrams dated fifteenth received yesterday. No construction work whatever has been done on Colville Reservation for line of railroad of the Washington Improvement and Development Company."

The question as to whether or not the inhibition contained in Section 1, of the Act of March 2, 1899 (under which act the application of the Republic & Kettle River Railway Company was made) should apply in that case, where it was shown that the Company first securing the rights to locate the road had not complied with the terms and provisions of the Act under which the authority was granted, was submitted for Departmental consideration.

It is provided in Section 3, of said Act of June 4, 1898, as follows:

"That when a map showing any portion of said railway company's located line is filed herein as provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void. * * * "

Section 5, of said Act, provides as follows:

"That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said Reservation within two years after the passage of this Act."

Following the procedure adopted by the Department with respect to the approval of the maps of the Republic & Kettle River
61 Railway Company, the Office transmitted with recommendation for approval maps showing the proposed line of route of the Spokane & British Columbia Railway Company through the south half of the Colville Indian Reservation, along the valley of the Sans Poil River, ignoring any rights formerly acquired to such line of route by the Washington Improvement & Development Company, and the maps of definite location of the Spokane & British Columbia Railway Company were accordingly approved October 18, 1905.

The Washington & Great Northern Railway Company, successor in interest, as alleged by Mr. Benton in his telegram herewith, of the Washington Improvement & Development Company, desirers to go upon the Indian Reservation for the purpose, as alleged, of retracing the original line of its predecessor. In this connection you are advised that in a letter dated August 3, 1906, Mr. Thomas R. Benton

requested that there be forwarded to him certified copies of the maps of original location of the Washington Improvement & Development Company, showing the line of route through the valley of the Sans Poil River, and these copies have been prepared, and will go forward in to-day's mail.

Laying aside the question as to whether or not the Washington Improvement & Development Company, or its assigns, have forfeited the right to construct this line of railroad through the south half of the Colville Indian Reservation, along the route shown on the maps approved June 23, and August 2, 1899, under the operation of the provision in Section 3 of said Act, and also the provisions of Section 5, it is submitted that it has exhausted its right to survey any additional line in the Reservation coming in conflict with another line located under Departmental authority; and further for the
62 purpose of litigation, the certified copies of the maps showing the approved line show the location of the only line to which the litigant can lay claim.

It is thought the action of the Indian Agent should be sustained, and it is therefore recommended that the Office be directed to advise Mr. Benton that the Department will hold the Washington Improvement & Development Company has exhausted its rights to make additional surveys in the Colville Indian Reservation, and conflicting with other approved rights of way, under authority contained in the Act of Congress of June 4, 1898.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

C. F. H.—L. C.

63 L. WM. F.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 14, 1906. J. J. C.

The Commissioner of Indian Affairs.

SIR: I have considered your letter of the 11th instant, relative to the right of the Washington and Great Northern Railway Company to acquire rights across the Colville Indian Reservation formerly granted to the Washington Improvement & Development Company.

In accordance with your recommendation and for the reasons stated in detail in your letter, you are hereby authorized to inform Mr. Thomas R. Benton, Attorney for the Great Northern Railway Line, that the Department holds that the Washington Improvement and Development Company has exhausted its rights to make additional surveys in the Colville Indian Reservation and conflicting with other approved rights of way, under the authority contained in the Act of Congress of June 4, 1898.

The enclosures of your letter are herewith returned.

Very respectfully,

THOS. RYAN,
Acting Secretary.

10341 Ind. Div. 1905.
7950 " " 1906.
2 enclosures.
JES.

64 6859. Filed Jul- 23, 1907. C. S. Reinhart, Clerk.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *September* 8, 1906.

I, F. E. Leupp, Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file and of record in this Office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, on the day and year first above written.

[SEAL.]

F. E. LEUPP,
Commissioner.

Indorsed: Pl'tff's Ex. G G.

65 6859. Filed Jul- 23, 1907. C. S. Reinhart, Clerk.

S. H. RICHARDSON, a witness called on the part of the plaintiff, after being first duly sworn, testified in rebuttal as follows:

Direct examination.

By Mr. BECK:

Q. What is your occupation?
A. Civil engineer.
Q. How long have you been a civil engineer?
A. Well, I have been working at it for several years.
Q. Well, are you connected with the plaintiff company at this time?
A. Yes, sir, I am.
Q. How long have you been working for them?
66 A. Since the 6th day of July, 1906.
Q. Have you been engaged in any actual surveys of late years?
A. Yes, sir, I was engaged in retracing the line of the Spokane & British Columbia railway, from Republic south.
Q. Where else?
A. Also in making maps and other things for the company.
Q. Did you work for any other company?
A. Yes sir, I worked for the Belcher Mountain Railway Company.
Q. What did you do?
A. I helped to locate their line down the San Poil valley.
Q. I present you with a map designated "Map showing conflict of line of the Washington & Great Northern Railway Company, with the line of the Washington Improvement & Development Company, from Curlew, to Republic, Washington." I will ask you if you prepared that map?
A. Yes, sir, I prepared that map.
Q. What is the color of the Washington & Great Northern Railway Company's line, as shown on that map?
A. It is shown by the green line.

Q. And what is the color of the line of the Washington Development & Improvement Company?

A. It is shown by the orange colored line.

Q. Upon what basis did you work in preparing this map?

A. I made this map from the certified copies of the two railways, the Washington & Great Northern and the Washington Improvement & Development Company.

Q. Well, where the lines are identical, I mean at the points of conflict, what do they show, what color?

A. The green line shows the present constructive line of the Washington & Great Northern Railway. Where the orange colored line is not shown on the map, the green line covers it en-
67 tirely, and it represents the present railway of the Washington & Great Northern Railway.

Q. The distance covered on this map is from Curlew to Republic?

A. Yes sir.

Q. And what is the distance?

A. I don't know the exact distance.

Q. Well, about the distance?

A. About twenty miles.

Mr. BECK: If the Court please, the plaintiff will offer this map in evidence.

Mr. MURRAY: Objected to as incompetent, irrelevant and immaterial.

The COURT: The objection is overruled.

Mr. MURRAY: Exception.

The map above referred to by the witness was here marked "Plaintiff's Exhibit X."

Q. I hand you here a map designated, "Map showing conflict of line of Washington & Great Northern, with line of Washington Improvement & Development Company from Curlew to Ferry."

A. Yes, sir.

Q. Did you prepare that map?

A. Yes, sir.

Q. And what was the basis of preparation—how did you prepare it?

A. I prepared it in the same manner I prepared the previous map.

Q. What is the color of the Washington & Great Northern Railway on that map?

A. The colors are the same on both maps.

Q. How about the points of conflict?

68 A. They are just the same as on the other maps.

Mr. BECK: We offer this map in evidence.

Mr. MURRAY: Objected to as incompetent, irrelevant and immaterial.

The COURT: The objection is overruled.

Exception.

The map above referred to received in evidence and marked "Plaintiff's Exhibit Y."

Q. I will present to you a map designated "Map showing conflict of line of Washington & Great Northern Railway and Spokane & British Columbia Railway, with the line of the Washington Development & Improvement Company, from Curlew to Curlew Lake, Washington." Did you prepare that map?

A. Yes, sir.

Q. And in what color is the Washington & Great Northern Railway shown?

A. In green.

Q. And in what color is the Spokane & British Columbia railway shown?

A. In red.

Q. And in what color is the Washington Improvement & Development Company's line shown?

A. Shown in orange.

Q. The Spokane & British Columbia Railway Company is the plaintiff, is it not?

A. Yes, sir.

Q. This map shows the present constructed line of the Washington & Great Northern Railway, and the Spokane & British Columbia railway?

A. Yes, sir.

Q. And also the located line of the Washington Improvement & Development Company's line?

69 A. Yes, sir.

Q. How about the other maps?

A. The other maps are the same.

Q. The other maps show the constructed line of the Washington & Great Northern Railway Company?

A. Yes sir.

Q. And all the located line of the Washington Improvement & Development Company?

A. Yes sir.

Q. And what color is shown at the places of conflict on this map?

A. The present constructed line of the Washington & Great Northern Railway covers the located line of the Washington Development & Improvement Company's line, and where they conflict, the only line shown is a green line.

Q. Well, which line is that?

A. That is the line of the Washington & Great Northern Railway Company.

Q. Well, what color represents the line of the plaintiff?

A. It is shown in red.

Mr. BECK: The plaintiff offers in evidence this map.

Mr. MURRAY: The same objection as heretofore.

The COURT: The objection is overruled.

Exception.

The above map was received in evidence and marked "Plaintiff's Exhibit Z."

Mr. BECK: Later on we shall ask permission to make a duplicate of these maps.

The COURT: Is there any objection to that.
Mr. MURRAY: No, no objection.
The COURT: Very well, it will be so allowed.

70 Cross-examination.

By Mr. MURRAY:

Q. The lines and the right of ways shown on this map you have referred to, are not the lines and right of ways that are in dispute in this proceeding?

A. Well, it shows portions of the same survey.

Q. Is the right of way shown on any of those maps involved in this controversy here.

Mr. BECK: That is objected to as incompetent, irrelevant and immaterial.

The COURT: The objection is overruled.

Mr. BECK: Exception.

A. Well, I don't know that they show the part on the south half. They simply show a continuation of the same survey.

Q. They don't show anything south of Republic, do they?

A. No, sir.

Endorsement: No. 599. In Superior Court Ferry County, Washington. Spokane & British Columbia Railway Company, Plaintiff, vs. Washington & Gt. Northern Railway Company et al., Defendants. Proposed Statement of Facts. Filed this 18 day of April, 1907. J. C. Caie, Clerk. Service admitted this 20th day of April, 1907. M. J. Gordon, Charles A. Murray, Geo. V. Alexander, Thos. R. Benton, Attorneys for Defendants.

71 In the Supreme Court of the State of Washington.

No. 6859.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Respondents,

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Development Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, Appellants.

Petition for Writ of Errors.

To the Honorable Judges of the Supreme Court of the State of Washington:

Your petitioner, the above named Spokane & British Columbia Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, the plaintiff and

respondent in the above entitled action, feeling itself aggrieved by the final judgment of this Court in this cause, heretofore entered on the 18th day of May, 1908, do hereby petition the Honorable Court for an order allowing said respondent and plaintiff, Spokane & British Columbia Railway Company to prosecute a writ of Error to the Honorable, the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said plaintiff and respondent, Spokane & British Columbia Railway Company, shall give and furnish upon said writ of Error.

The erro-s committed to the prejudice of this respondent and plaintiff, Spokane & British Columbia Railway Company will more fully and in detail appear from the assignment of errors which is filed with this petition and referred to as a part hereof.

72 And your petitioner will ever pray.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY,
By WILLIAM T. BECK, *Its Attorney.*

STATE OF WASHINGTON:

Desiring to give petitioner an opportunity to test in the Supreme Court of the United States the Federal question presented in the petition and assignment of errors herein,

It is ordered That a Writ of Error be allowed to said Court, and bond to be given for costs in the sum of One Thousand Dollars, ($1000.00).

In testimony whereof, witness my hand this 2nd day of June, 1908.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Endorsement: No. 6859. In the Supreme Court of the United States. The Spokane & British Columbia Railway Company, Plaintiff in Error, vs. Washington & Great Northern Railway Company, Washington Improvement and Development Company, et al., Defendants in Error. Petition for writ of Error. Filed June 2, 1908, C. S. Reinhart, Clerk.

73 In the Supreme Court of the State of Washington.

No. 6859.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Development Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, Defendants in Error.

Assignment of Errors.

And now, before the Justices of the Supreme Court of the United States of America, at the Capitol, in the City of Washington, comes the Spokane & British Columbia Railway Company, a corporation, plaintiff in error, by its counsel, in the above entitled case and in connection with its petition for a Writ of Error, makes the following assignment of errors, which it avers occurred on the trial of said case in the Supreme Court of the State of Washington, to-wit:

I.

The Court erred in holding, that the Act of Congress of June 4, 1898, under which defendants in error claim, constituted a grant in presenti.

II.

The Court erred in holding, that the title to the right of way vested in the Washington Improvement and Development Company, upon the filing and approval of its maps of location.

III.

The Court erred in holding that the Washington Improvement and Development Company, or its successors or assigns ever acquired any interest in said right of way.

74 IV.

The Court erred in holding that the provision of said Act of Congress that said "located line should be void unless grading be commenced within six months" was a condition subsequent.

V.

The Court erred in not holding that all rights acquired by the Washington Improvement and Development Company or its successors in interest under the Act of June 4, 1898, had been abandoned as fully appears in the Statement of Facts and Bill of Exceptions presented to said court on said appeal.

VI.

Lastly, the Court erred in rendering and entering its judgment in said case in favor of the defendants in error and against the plaintiff in error, and in remanding and reversing the judgment of the lower court.

Wherefore the said, The Spokane & British Columbia Railway Company, prays that the judgment and decision aforesaid may be reversed, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the said judgment and decision.

WILLIAM T. BECK,
Attorney for Plaintiff in Error.

(Endorsement:) No. 6859. In the Supreme Court of the United States. The Spokane & British Columbia Railway Company, Plaintiff in Error vs. Washington & Great Northern Railway Company, Washington Improvement and Development Company, et al. Defendants in Error. Filed Jun- 2, 1908, C. S. Reinhart, Clerk. Assignment of Error.

75 In the Supreme Court of the State of Washington.

No. 6859.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Respondents,

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement and Development Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, Appellants.

Bond on Writ of Error.

Know all men by these presents:

That we, The Spokane & British Columbia Railway Company, a corporation organized and existing under the laws of the State of Washington as principals, and the United States Fidelity & Guaranty Company of Maryland, a corporation organized and existing under the laws of Maryland, and duly organized to go surety on bonds, as surety, are held and firmly bound unto the said Washington & Great Northern Ry. Co., a corporation, The Washington Improvement and Development Company, a corporation, John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, Defendants in Error, in the full sum of One Thousand ($1000.00) Dollars to be paid to the said The Washington & Great Northern Railway Company, a corporation, the Washington Improvement and Development Company, a corporation, John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, or their attorneys, executors, admin-

istrators or assigns, which payment well and truly to be made
76 we bind ourselves successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 9th day of June, in the year of our Lord 1908.

Whereas, lately at the Supreme Court of the State of Washington in a suit pending in said Court between the said, the Spokane & British Columbia Railway Company, a corporation, Respondents and Plaintiffs, and The Washington & Great Northern Railway Company, a corporation, the Washington Improvement and Development Company, a corporation, John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, Appellants and Defendants, a judgment was rendered against the said, The Spokane & British Columbia Railway Company, a corporation, and the said The Spokane & British Columbia Railway Company, a corporation, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said, The Washington & Great Northern Railway Company, a corporation The Washington Improvement and Development Company, a corporation, John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington on the 18th day of August, 1908. And

Now, the condition of the above obligation is such that if the said, The Spokane & British Columbia Railway Company, a corporation shall prosecute said writ of error to effect, and answer all costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

THE SPOKANE & BRITISH COLUMBIA RAILWAY CO.,

[SEAL.] By WILLIAM T. BECK, *Its Attorney.*

77 THE UNITED STATES FIDELITY & GUARANTY COMPANY,

[SEAL.] By J. E. RITTER, *Its Attorney in Fact.*

JAMES T. JOHNSTON,
Its Attorney in Fact.

Signed, Sealed and delivered in presence of,
DAVID FELKER.
EDW. G. HARVEY.

The foregoing bond and the surety thereof are hereby approved this 18th day of June, 1908.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Endorsement: No. 6859. In the Supreme Court of the United States. The Spokane & British Columbia Railway Company, Plaintiff in Error, vs. Washington & Great Northern Railway Company, Washington Improvement & Development Company, et al. Defendants in Error. Bond on Writ of Error. Filed this 18th day of June, 1908. C. S. Reinhart, Clerk.

78 THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the state of Washington, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between, The Spokane & British Columbia Railway Company, a corporation, and The Washington & Great Northern Railway Company, a corporation, The Washington Improvement and Development Company, a corporation, John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hyden, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statutes of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Spokane & British Columbia Railway Company,

79 as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington on the 3rd day of August, 1908, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of June in the year of our Lord, 1908.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk United States Circuit Court,
District of Washington,
By R. M. HOPKINS,
Deputy Clerk.

The above writ of error is hereby allowed.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court
of the State of Washington.

80 [Endorsed:] No. 6859. In the Supreme Court of the United States. The Spokane & British Columbia Railway Company, Plaintiff in Error, vs. Washington & Great Northern Railway Company, Washington Improvement & Development Company et al., Defendants in Error. Writ of Error. Filed Jun- 5, 1908. C. S. Reinhart, Clerk.

81 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Washington & Great Northern Railway Company, a corporation; The Washington Improvement and Development Company, a corporation: John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, defendants in error, Greeting:

You, and each of you, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within sixty (60) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Washington, wherein the Spokane and British Columbia Railway Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, *has* in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of June, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Supreme Court, State of Washington.]

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Attest:
C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Service of the above and foregoing Citation, together with a copy of Petition for writ of error, Assignment of errors, Writ of error and Bond is hereby admitted this 1st day of July, 1908.

M. J. GORDON,
Attorney for Defendants in Error.

[Endorsed:] 6859. Filed Jul- 14, 1908. C. S. Reinhart, Clerk.

82 In the Supreme Court of the State of Washington.

No. 6859.

THE SPOKANE & BRITISH COLUMBIA RAILWAY COMPANY, a Corporation, Respondent (Plaintiff in Error),

vs.

THE WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, a Corporation; The Washington Improvement & Development Company, a Corporation; John Hughes, Patrick Welch, Albert M. Anderson, E. Ennerson, Alexander Kellett, Charles Hayden, Appellants (Defendants in Error).

Certificate of Clerk of Supreme Court.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington do hereby certify that the foregoing is a full, true and correct transcript of that part of the record on file in this Court in said cause, according to, and as specified and directed in the præcipe of counsel for Plaintiff in error, a true copy of such præcipe being attached and made a part of the foregoing transcript; and

I Further Certify that I have attached to and made a part of this transcript a true, full and correct copy of the opinion and judgment filed by the Supreme Court of the State of Washington in this cause, together with a full and true copy of the Petition for Writ of Error, Assignment of Errors; Bond on Writ of Error, and I hereby transmit the same together with the original writ of error, and original citation with the admission of service attached to said citation.

In testimony whereof I have hereunto set my hand and fix the seal of the said Supreme Court at Olympia, this 23d day of July, 1908.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

83 (Here follow maps marked pages 84, 85, and 86.)

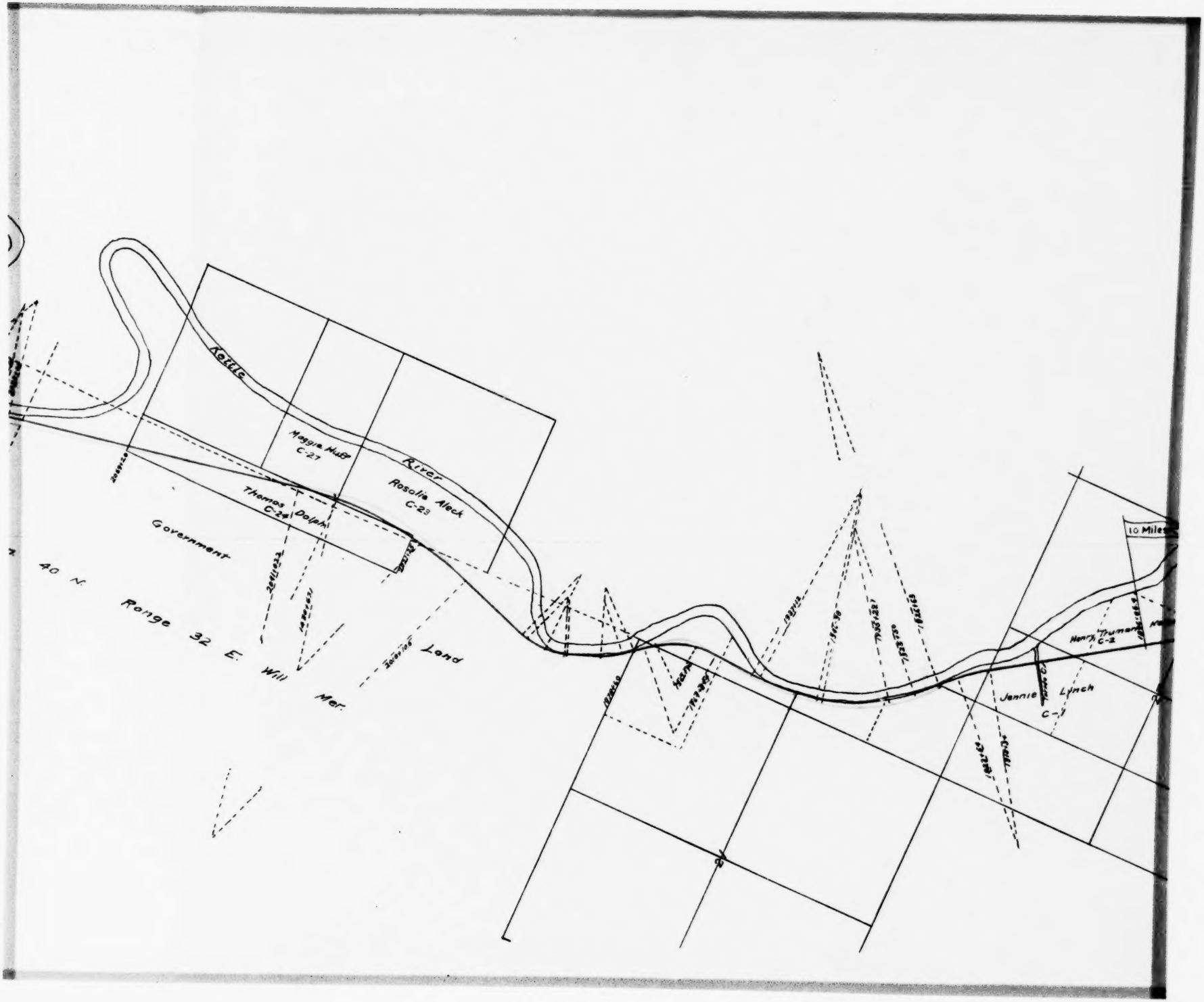
84 Plff's Ex. "Y." Conflict, G. N. with W. I. D. Co. Curlew to Ferry. No. 225. S. and B. C. Ry. Co. v. W. & G. N. Ry. Co. et al.

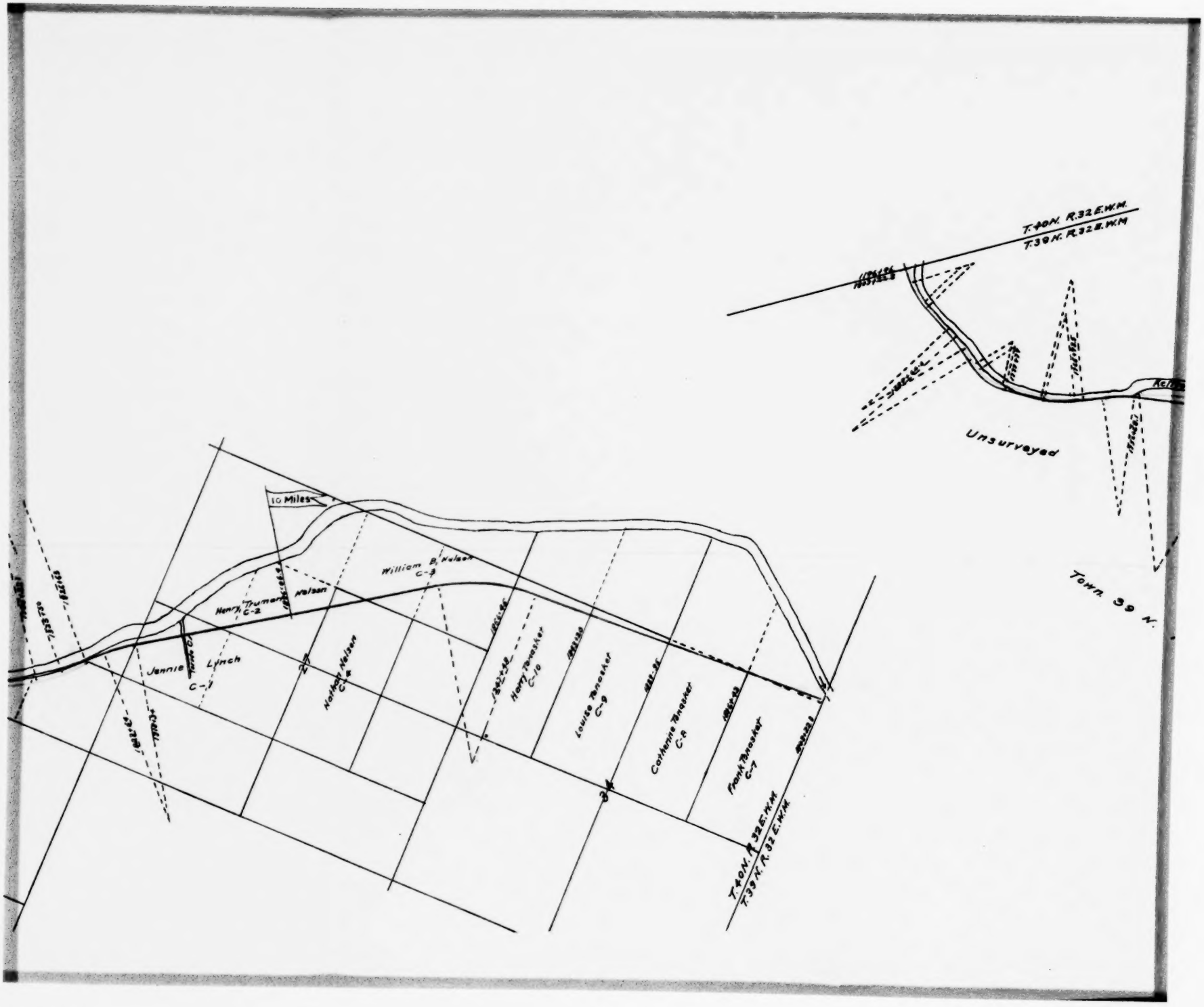
85 Plff's Ex. X. Conflict, G. N. and W. I. D. Curlew to Republic. No. 225. S. & B. C. Ry. Co. vs. W. & G. N. Ry. Co. et al.

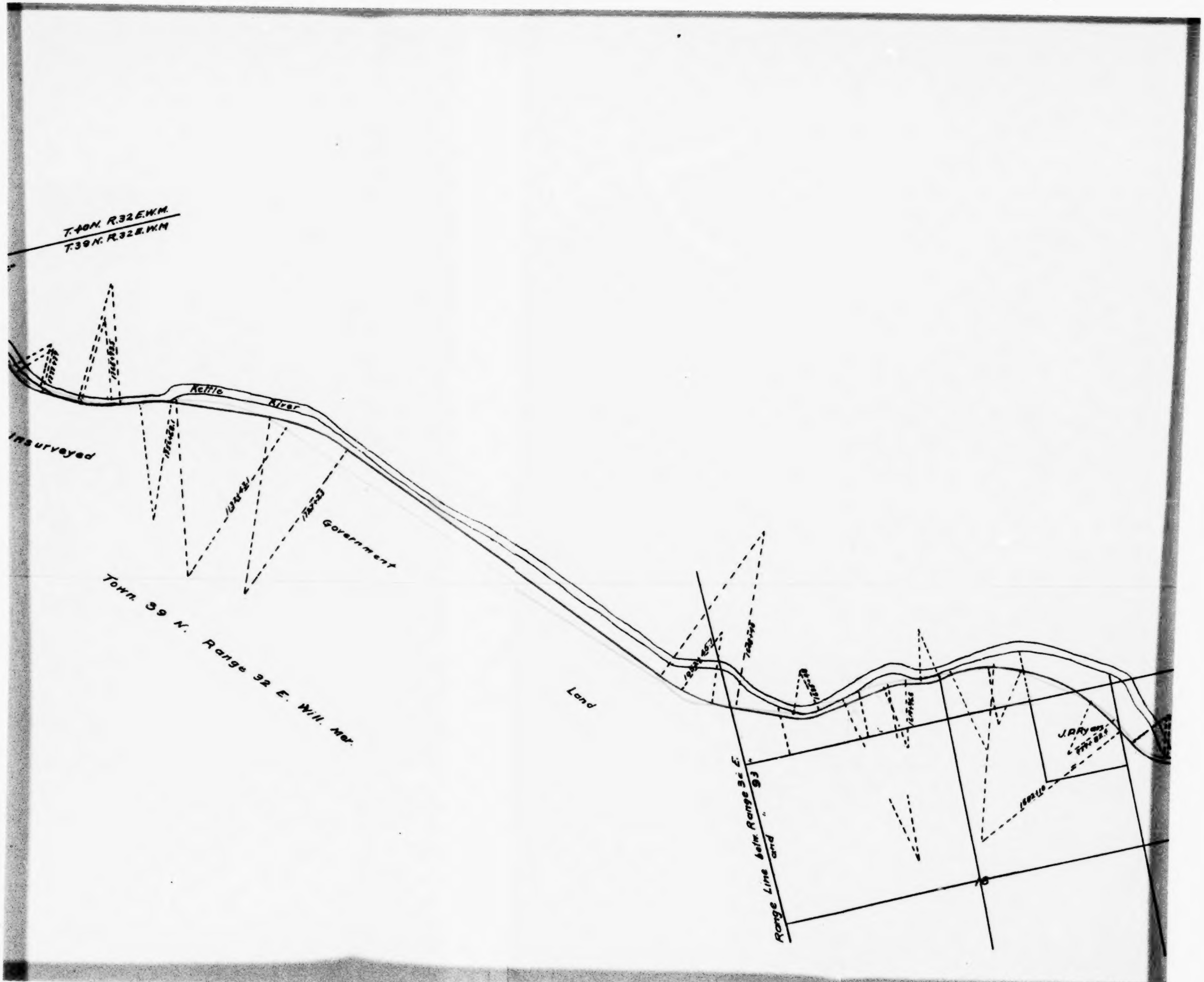
86 Plff Exh. "Z." Conflict, G. N. and S. & B. C. Ry. Co. W. I. D. Co. Curlew to Curlew Lake. No. 225. S. & B. C. Ry. Co. v. W. & G. N. Ry. Co. et al.

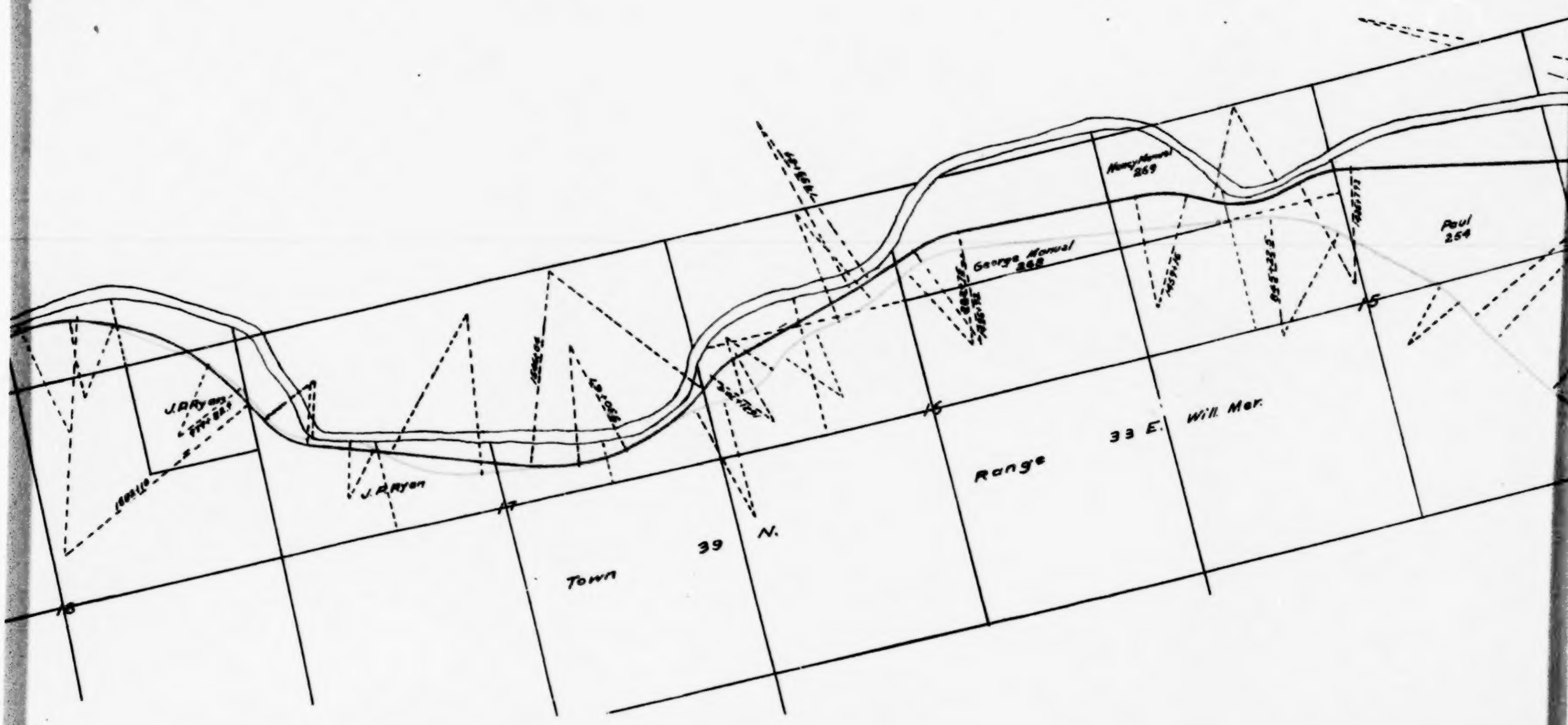
Endorsed on cover: File No. 21,290. Washington supreme court. Term No. 225. The Spokane and British Columbia Railway Company, plaintiff in error, vs. The Washington and Great Northern Railway Company, The Washington Improvement & Development Company, John Hughes et al. Filed August 6, 1908. File No. 21,290.

14.42 Miles
between British Columbia and United States
International Boundary Line
FERRY
Unsurveyed
Government
Town 40 N.
Range 32


Aquilla
Maggie Hull
C-27
River
Rosalia Aleck
C-23
Thomas
C-24
Dolph
Government
40 N.
Range 32 E.
Will
Mer.
Land
10 Miles
Henry Thumann
C-2
Jennie Lynch
C-1


T.40N. R.32E.W.M.
T.39N. R.32E.W.M.
Unsurveyed
10 Miles
William B. Nelson C-3
Henry Thurman Nelson C-2
Jennie Lynch C-1
Nathan Nelson C-4
Henry Brooker C-10
Louise Brooker C-9
Catherine Brooker C-8
Frank Brooker C-7
T.40N. R.32E.W.M.
T.39N. R.32E.W.M.
Town 39 N.


T. 40 N. R. 32 E. W. M.
T. 39 N. R. 32 E. W. M.
Unsurveyed
Kettle
River
Government
Land
Town 39 N. Range 32 E. Will. Mer.
Range Line betw. Range 32 E. and " 33
J. D. Ryan
10



J. P. Ryan
J. P. Ryan
Nancy Manuel
269
George Manuel
268
Paul
254
18
17
16
15
Town
39
N.
Range
33 E.
Will. Mer.

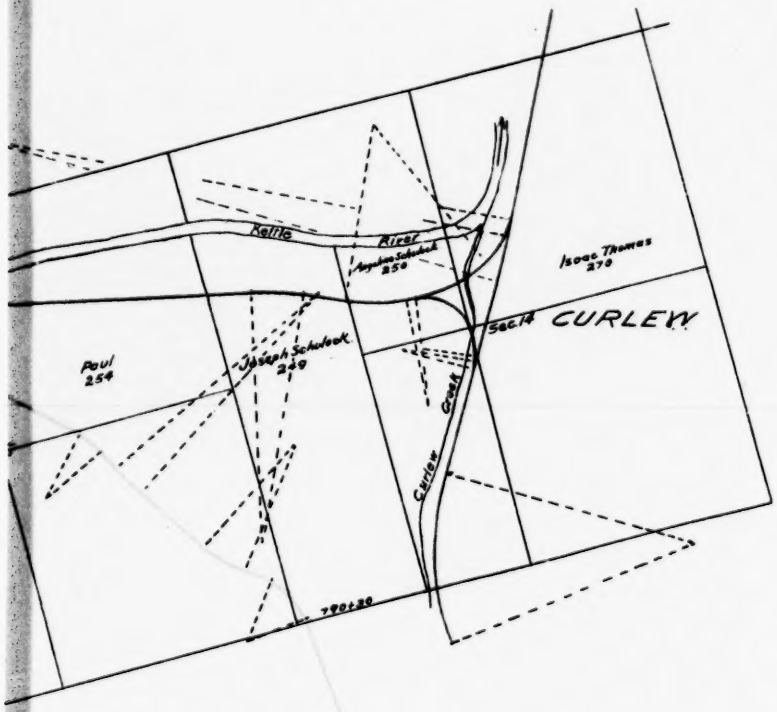
No. 225
Seaw B.C. Ry Co
W. & G.N. Ry Co del
P. 84

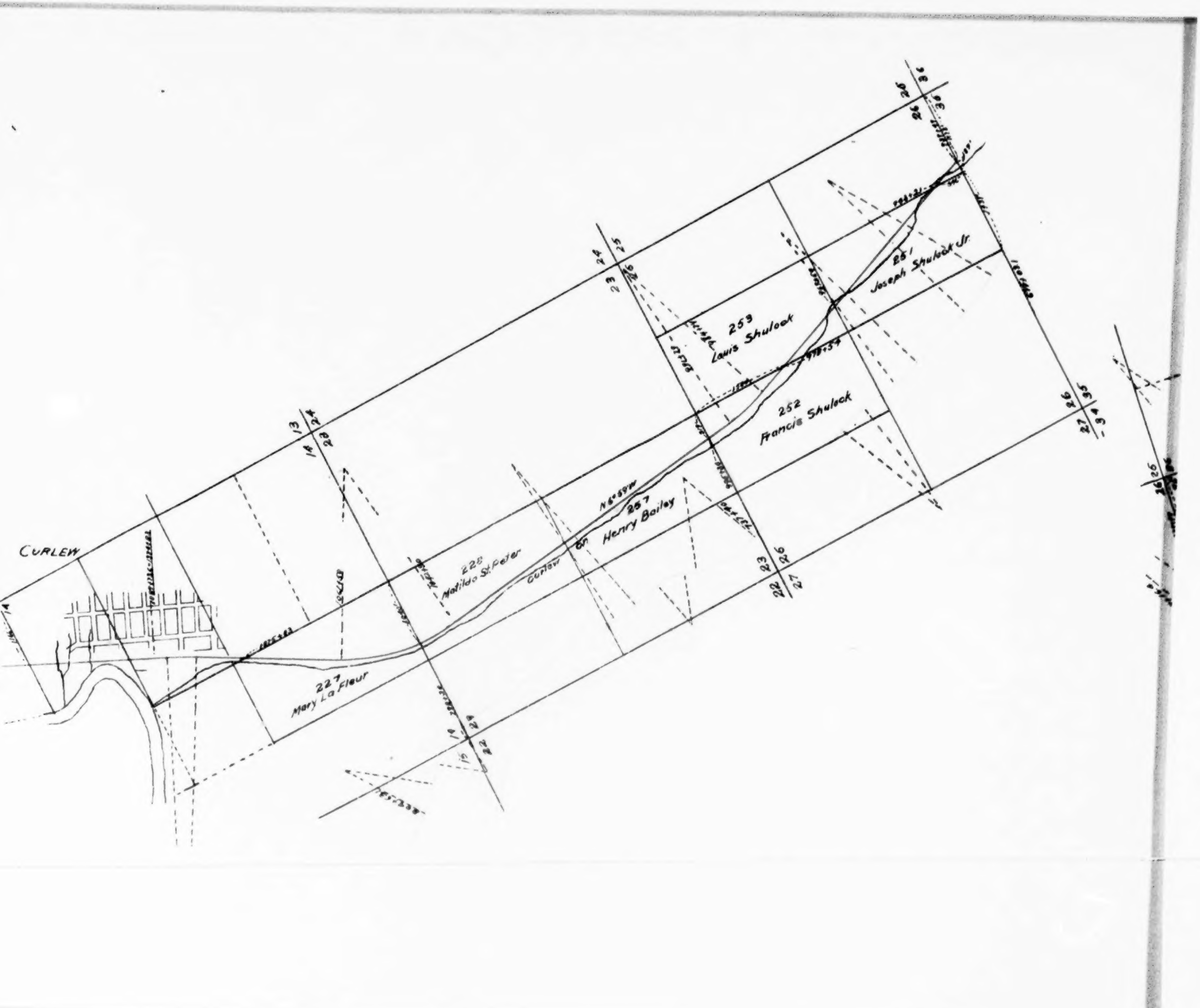
MAP SHOWING CONFLICT
OF LINE OF
WASHINGTON AND GREAT NORTHERN RY. CO
WITH LINE OF
WASHINGTON IMPROVEMENT AND DEVELOPMENT CO.
FROM
CURLEW TO FERRY - WASH.

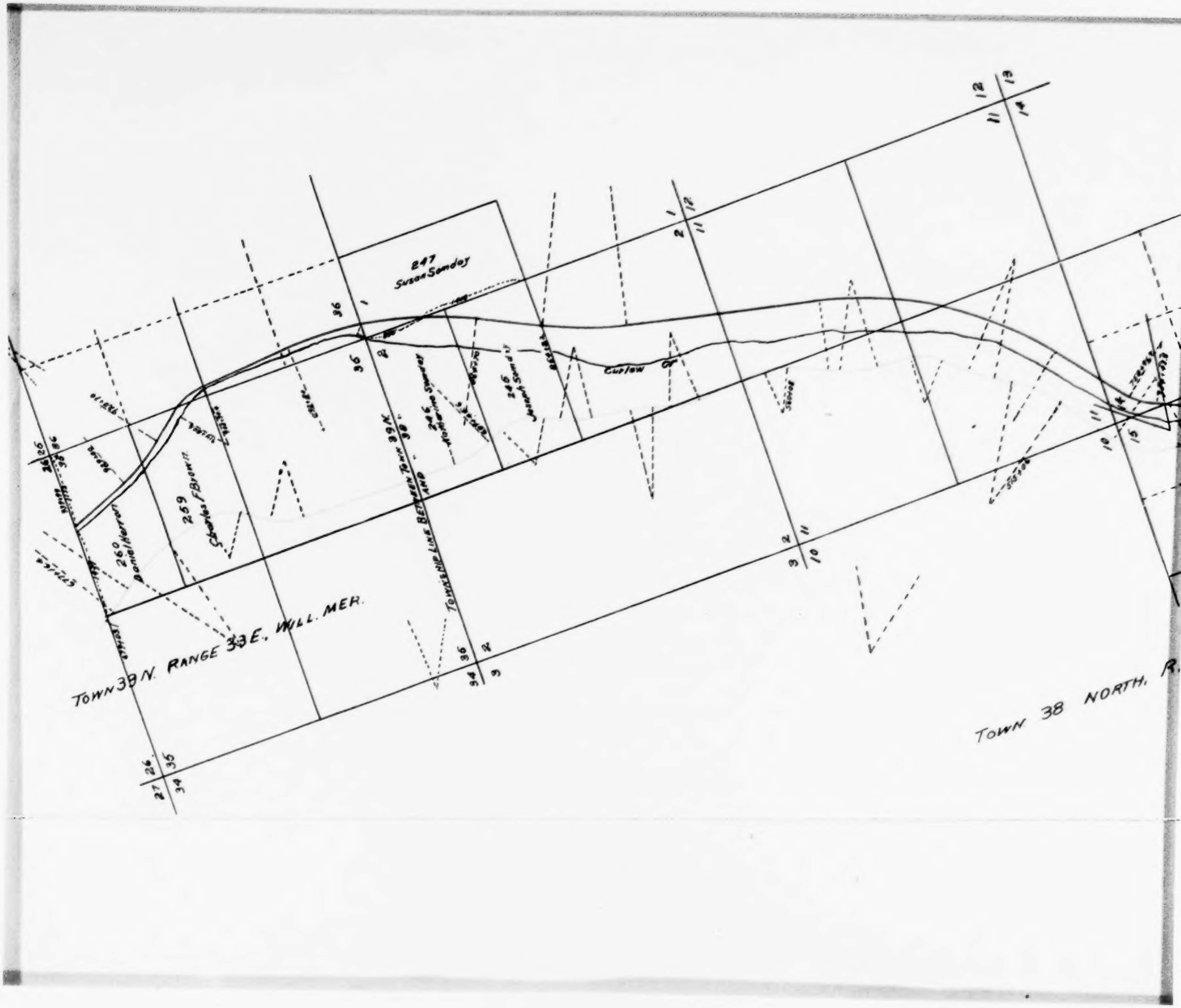
COMPILED FROM OFFICIAL MAPS ON FILE AT WASHINGTON D.C.
BY H.W. WARRINGTON CHIEF ENGINEER S^W.B.C.RY.CO

SCALE 1" = 800

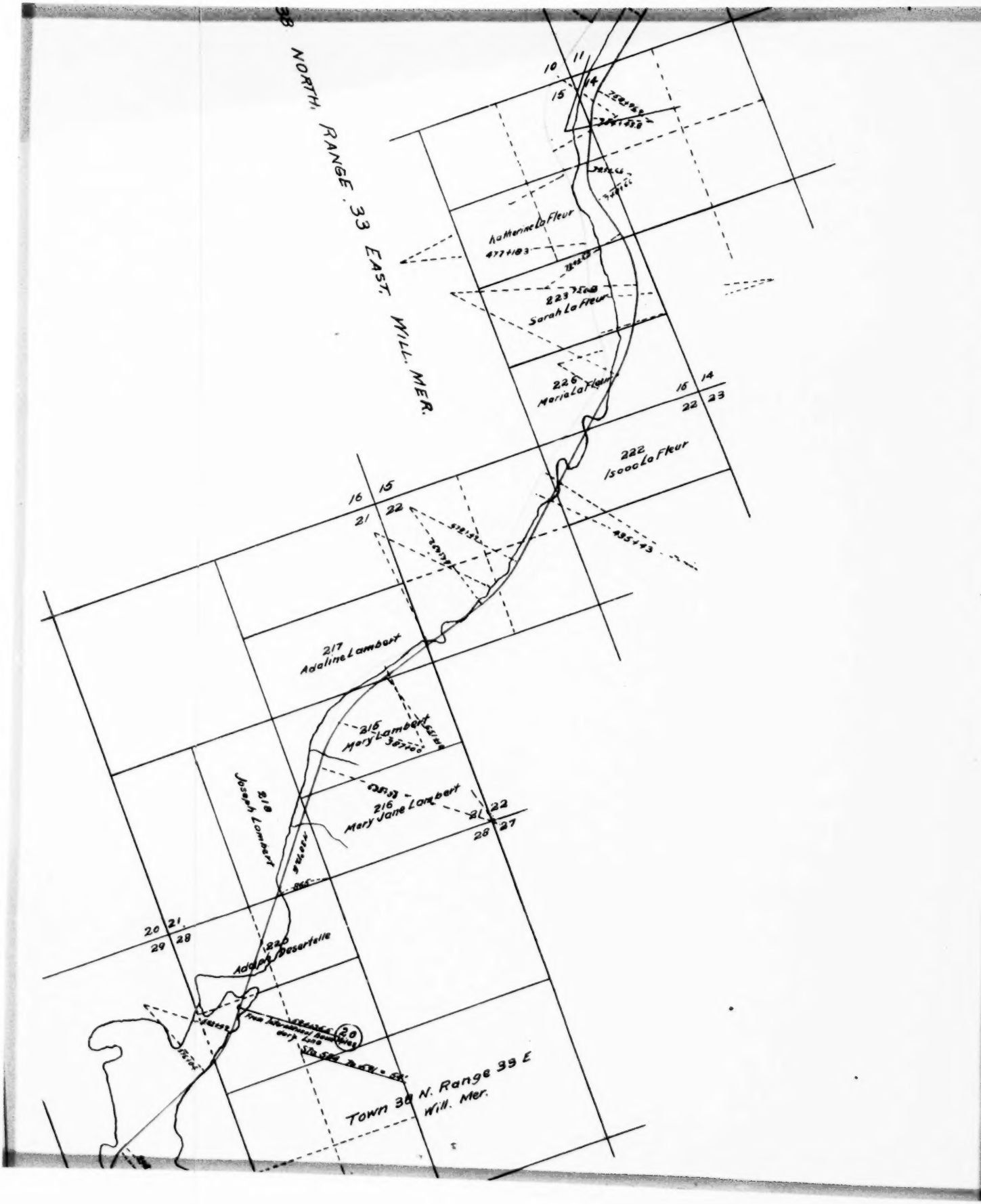
——— W. and G.N. Ry.
——— W. I. and D.Co.

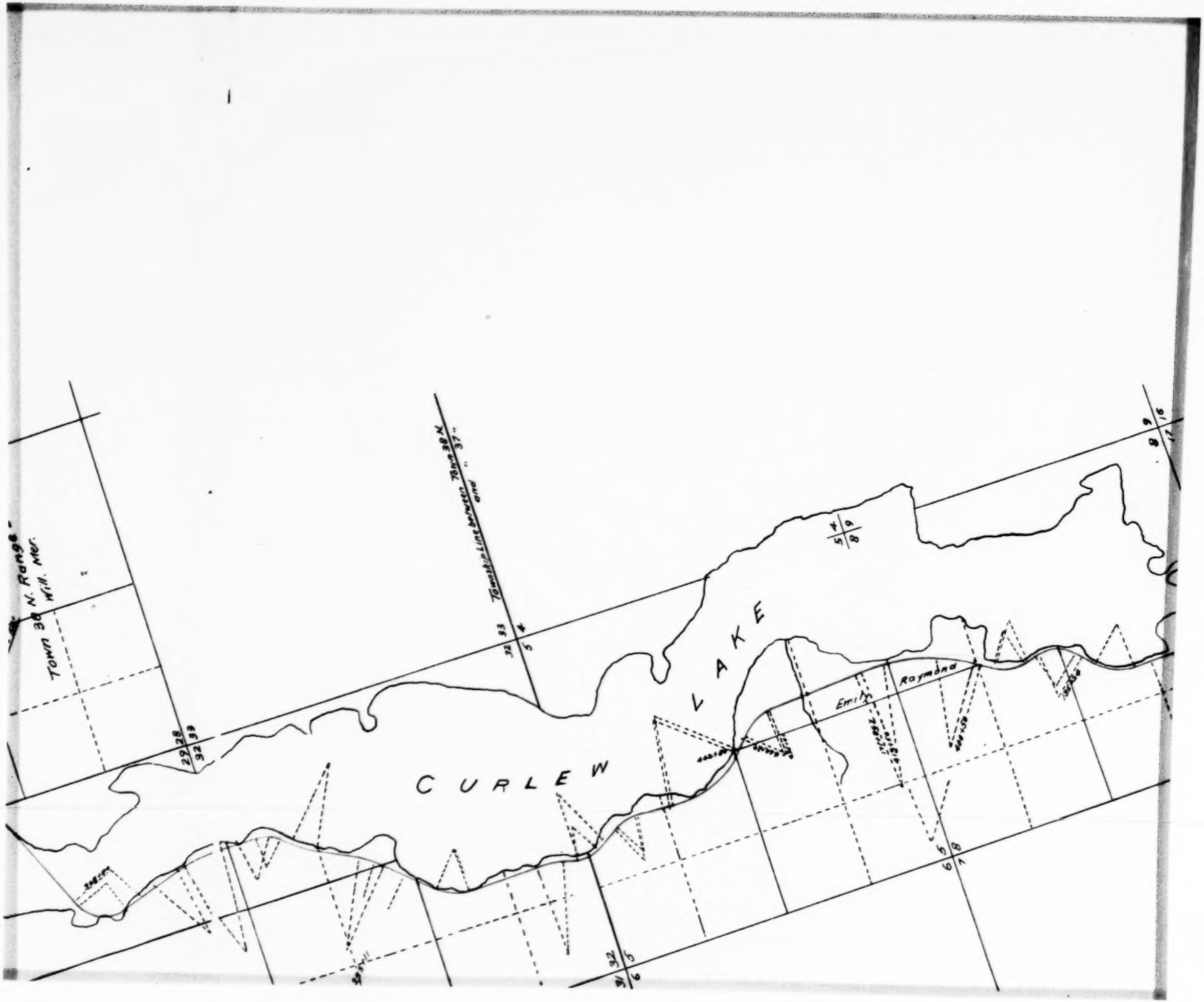


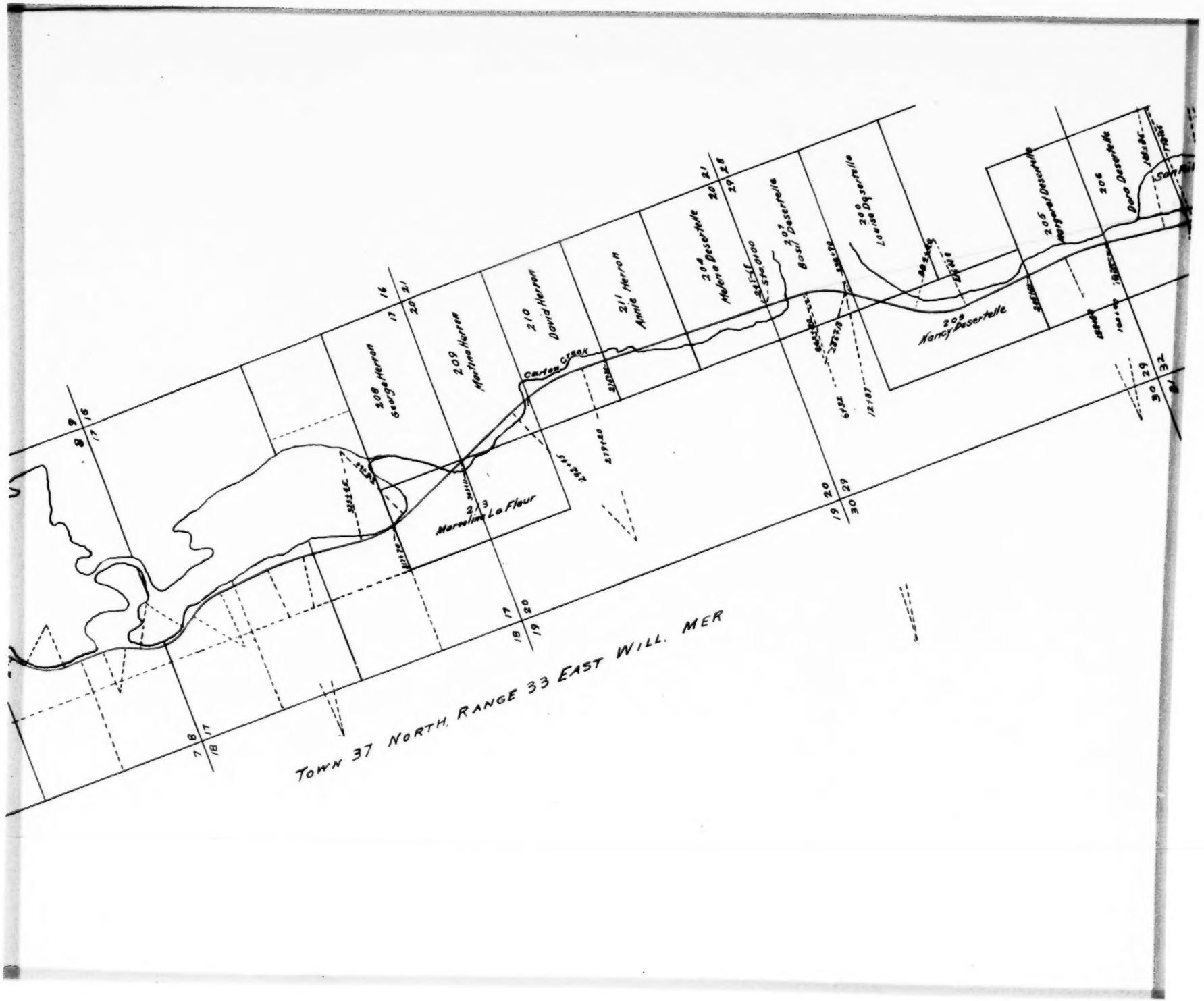

CURLEW
227
Mary La Fleur
228
Matilda St. Peter
Curlew Cr.
257
Henry Bailey
253
Louis Shulock
252
Francis Shulock
251
Joseph Shulock Jr.

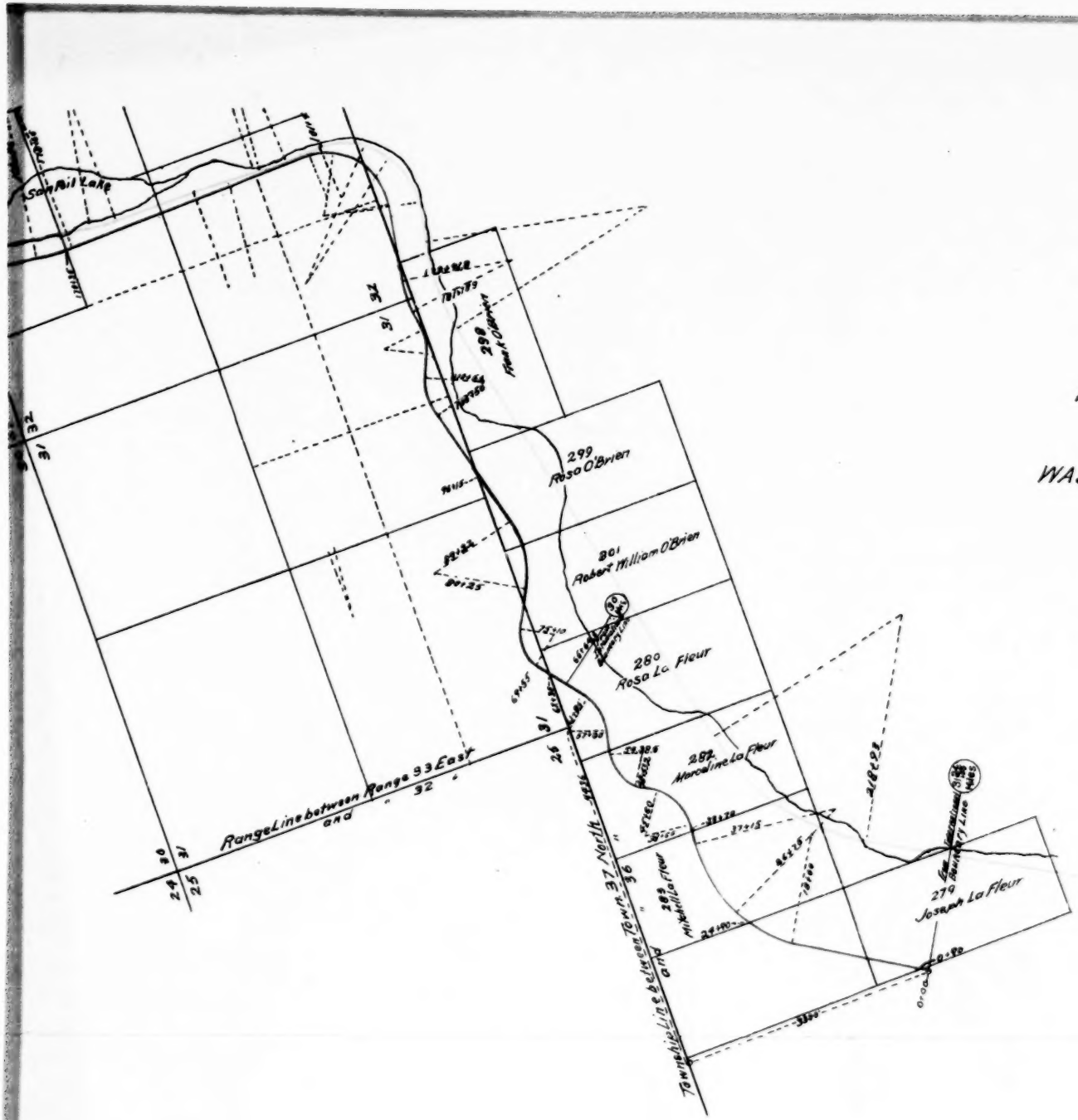


247
Susan Sonday
260
Daniel Herron
259
Charles F. Brown
Curlew Cr
TOWNSHIP LINE BETWEEN TOWN 39 N. AND 38 "
TOWN 39 N. RANGE 33 E. WILL. MER.
TOWN 38 NORTH, R.


38 NORTH, RANGE 33 EAST, WILL. MER.
10 11
15 14
La Marine La Fleur
477+183
223
Sarah La Fleur
226
Maria La Fleur
16 14
22 23
222
1500 La Fleur
16 15
21 22
217
Adaline Lambert
216
Mary Lambert
216
Mary Jane Lambert
21 22
28 27
219
Joseph Lambert
20 21
29 28
220
Adolph Desarteile
Town 38 N. Range 33 E
Will. Mer.


Town 38 N. Range
Will. Mer.
CURLEW
LAKE
Raymond
Emily


208 George Herron
209 Martina Herron
210 David Herron
211 Annie Herron
208 Helena Desertelle
207 Basil Desertelle
206 Louise Desertelle
205 Margaret Desertelle
204 Dora Desertelle
208 Nancy Desertelle
213 Marvelina La Fleur
Cartop Creek
TOWN 37 NORTH, RANGE 33 EAST WILL. MER



MAP SHOWING CO
OF LINE OF
WASHINGTON AND GREAT N
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WASHINGTON IMPROVEMENT A
FROM
CURLEW TO REPUBL
COMPILED FROM OFFICIAL MAPS ON FILE A
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SCALE 1" = 800
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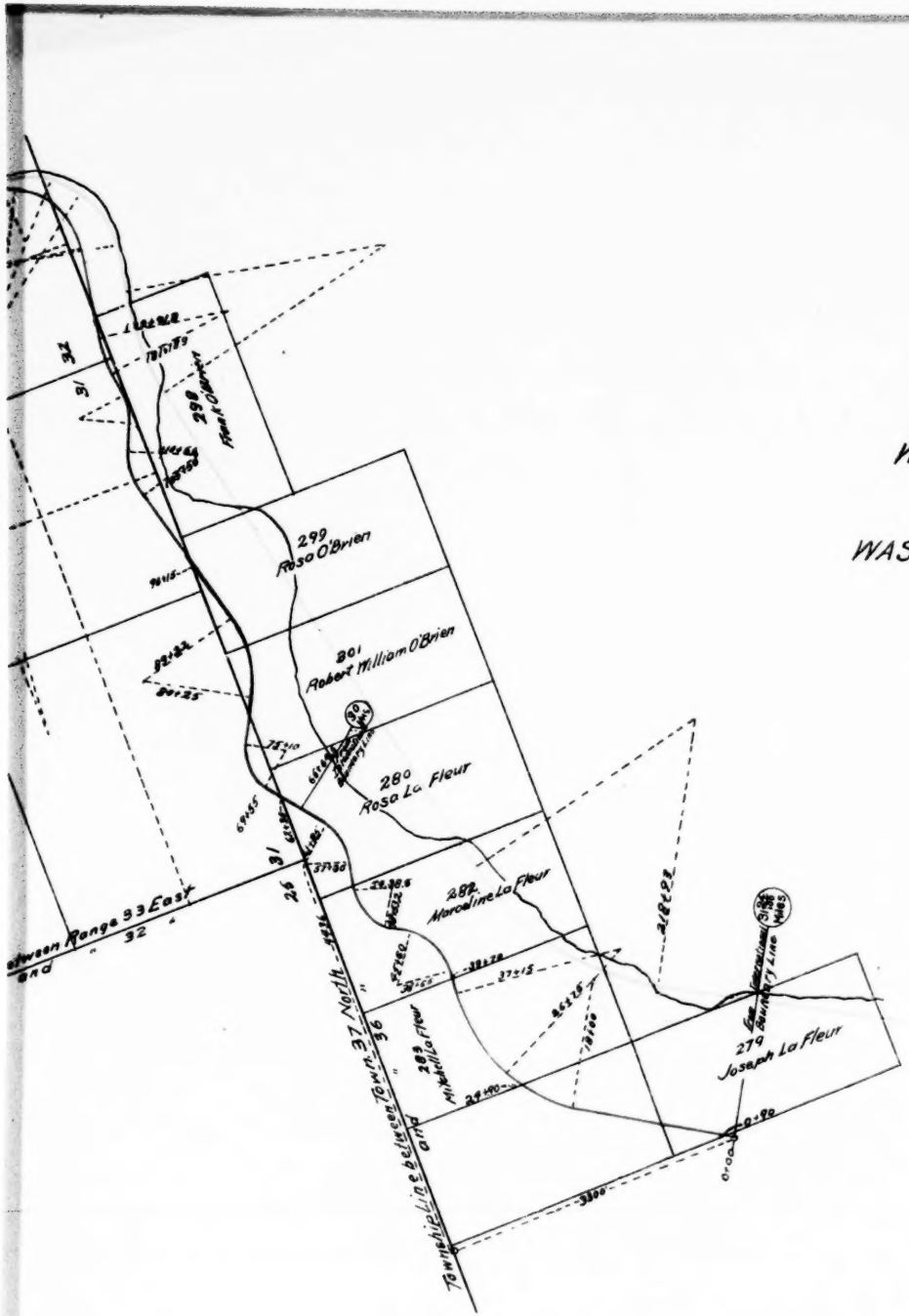


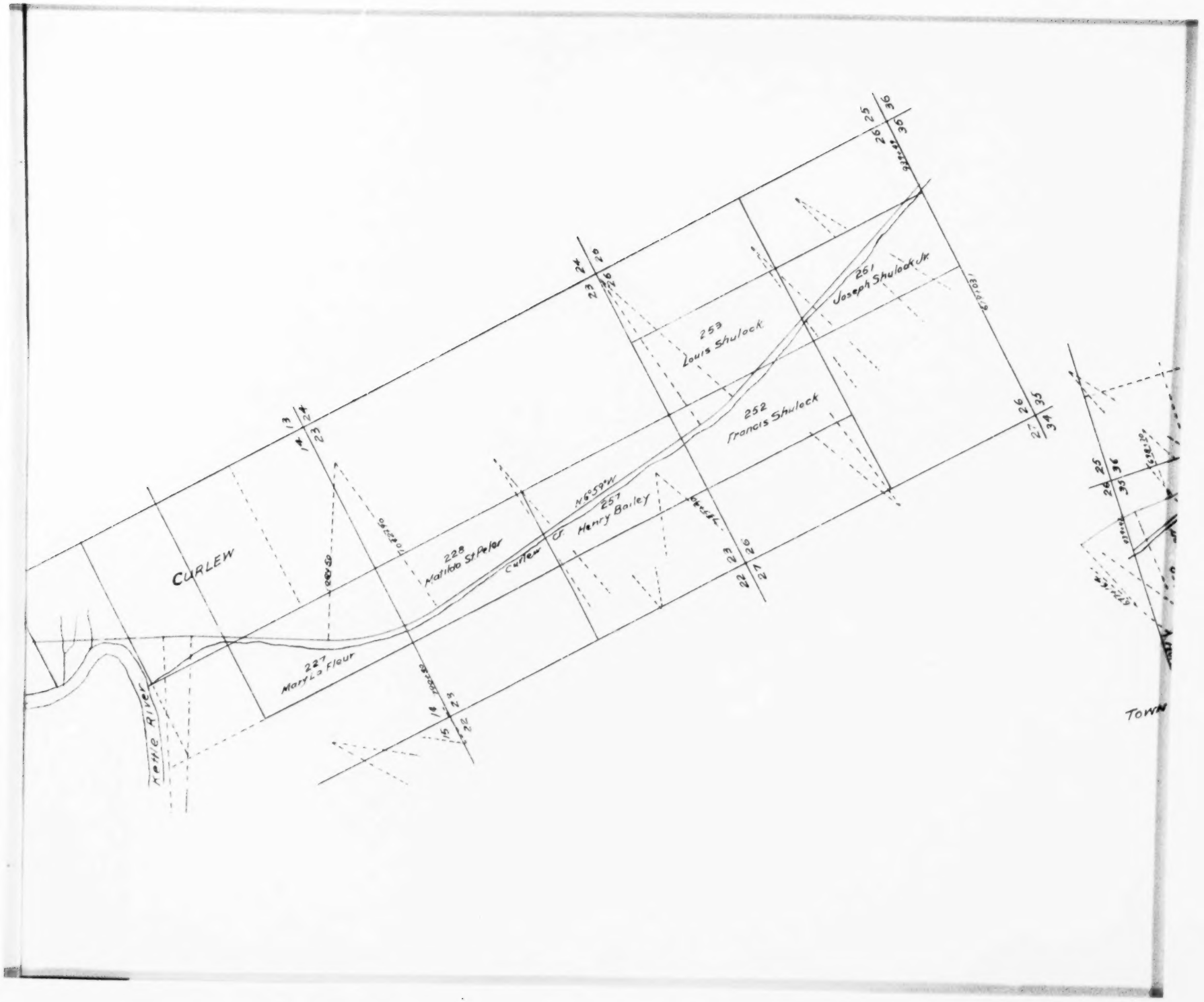
MAP SHOWING CONFLICT OF LINE OF WASHINGTON AND GREAT NORTHERN RY CO WITH LINE OF WASHINGTON IMPROVEMENT AND DEVELOPMENT CO. FROM CURLEW TO REPUBLIC-WASH

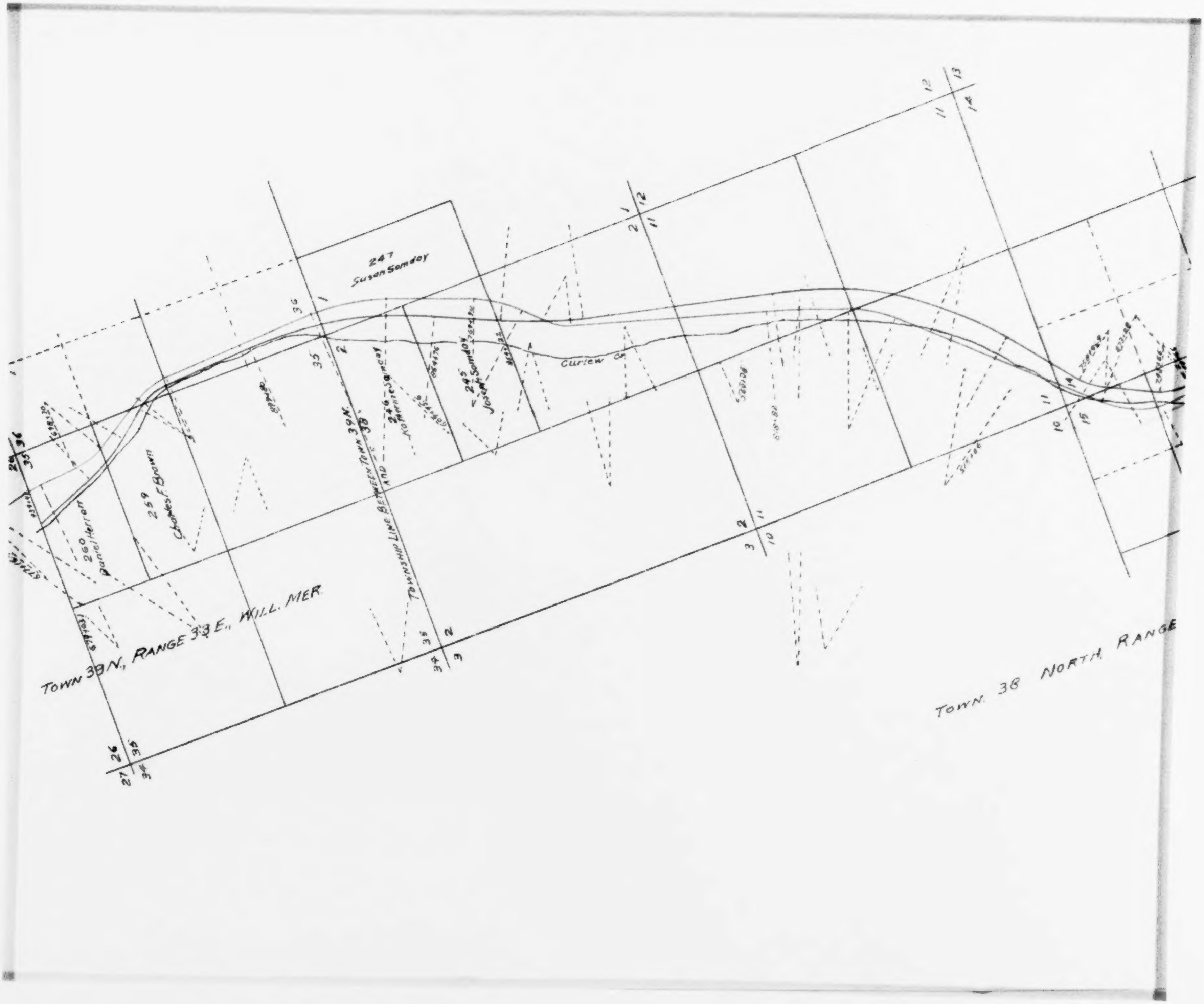
COMPILED FROM OFFICIAL MAPS ON FILE AT WASHINGTON D.C.
BY H.W.WARRINGTON, CHIEF ENGINEER S&B.C.RY.CO.

SCALE 1" = 800'

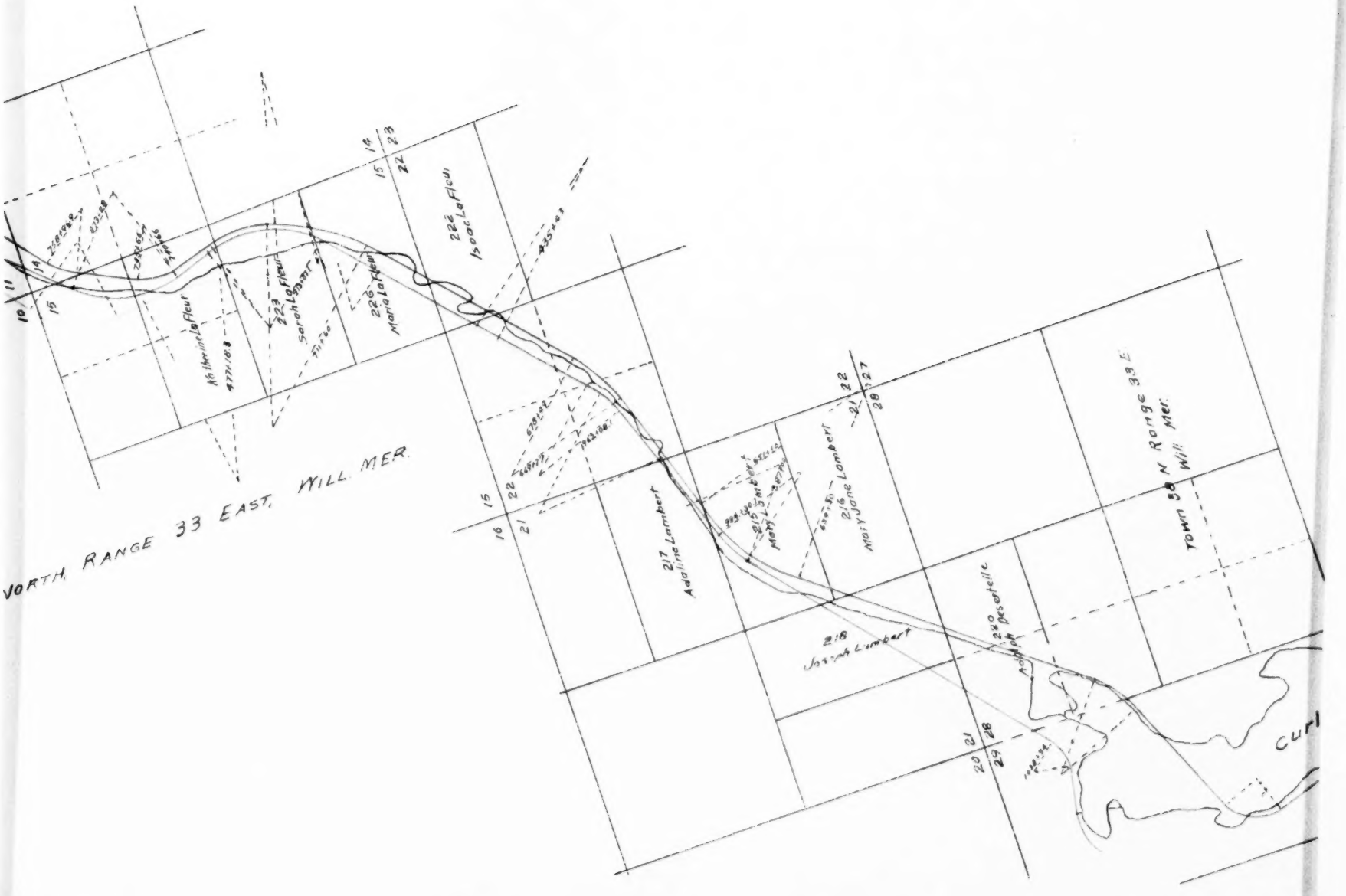
——— W and G.N. Ry
W. I and D. Co

No 225
S.&B.C.Ry Co } P. 85
vs
W.&G.N. Ry Co et al.


CURLEW
Kahle River
227
Mary L. Flour
228
Matilda St. Peter
257
Henry Bailey
253
Louis Shulock
252
Francis Shulock
261
Joseph Shulock Jr.
N 6°59°W
Curlew
TOWN



247
Susan Samday
259
Charles F Brown
260
Daniel Herron
245
Joseph Samday
Curlew Cr
Township Line Between Town 39 N. and 38
Town 39 N., Range 33 E., Will. Mer.
Town. 38 North Range


NORTH RANGE 33 EAST, WILL MER.
TOWN 38 N Range 33 E Will Mer.
223 Sarah LaFleur
226 Maria LaFleur
226 Isaac LaFleur
217 Adaline Lambert
216 Mary Jane Lambert
218 Joseph Lambert
220 Desartelle
Curl

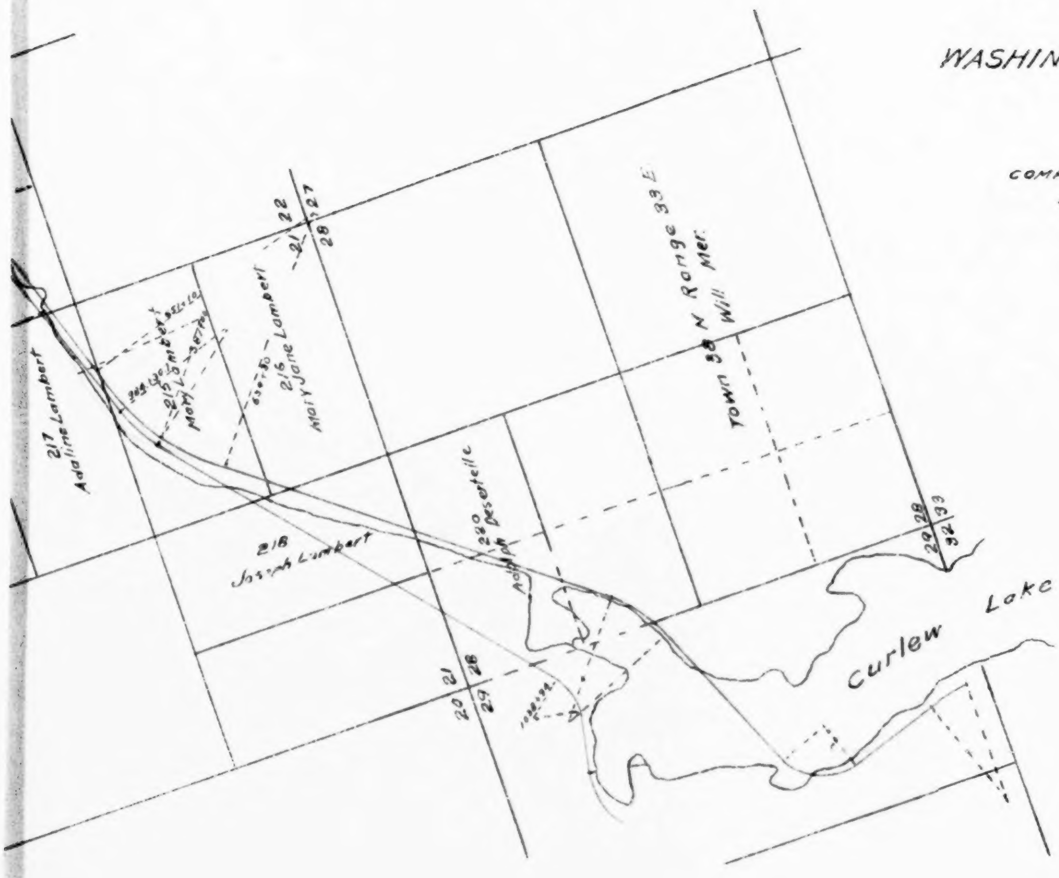
No 225
S&B.C Ry. Co. v W&G.N. Ry Co. etal. } p 86

MAP SHOWING CONFLICT OF LINE OF WASHINGTON AND GREAT NORTHERN RY. CO. AND SPOKANE AND BRITISH COLUMBIA RY. CO. WITH LINE OF WASHINGTON IMPROVEMENT AND DEVELOPMENT CO. FROM CURLEW TO CURLEW LAKE-WASH.

COMPILED FROM OFFICIAL MAPS ON FILE AT WASHINGTON D.C.
BY H.W. WARRINGTON, CHIEF ENGINEER S.&B.C.RY.Co

SCALE 1" = 800'

W. and G.N. Ry.
S. and B.C. Ry.
W. I. and D. Co.



no 225
S.&B.C. Ry. Co.
v
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MAP SHOWING CONFLICT OF LINE OF WASHINGTON AND GREAT NORTHERN RY. CO. AND SPOKANE AND BRITISH COLUMBIA RY. CO. WITH LINE OF WASHINGTON IMPROVEMENT AND DEVELOPMENT CO. FROM CURLEW TO CURLEW LAKE-WASH.

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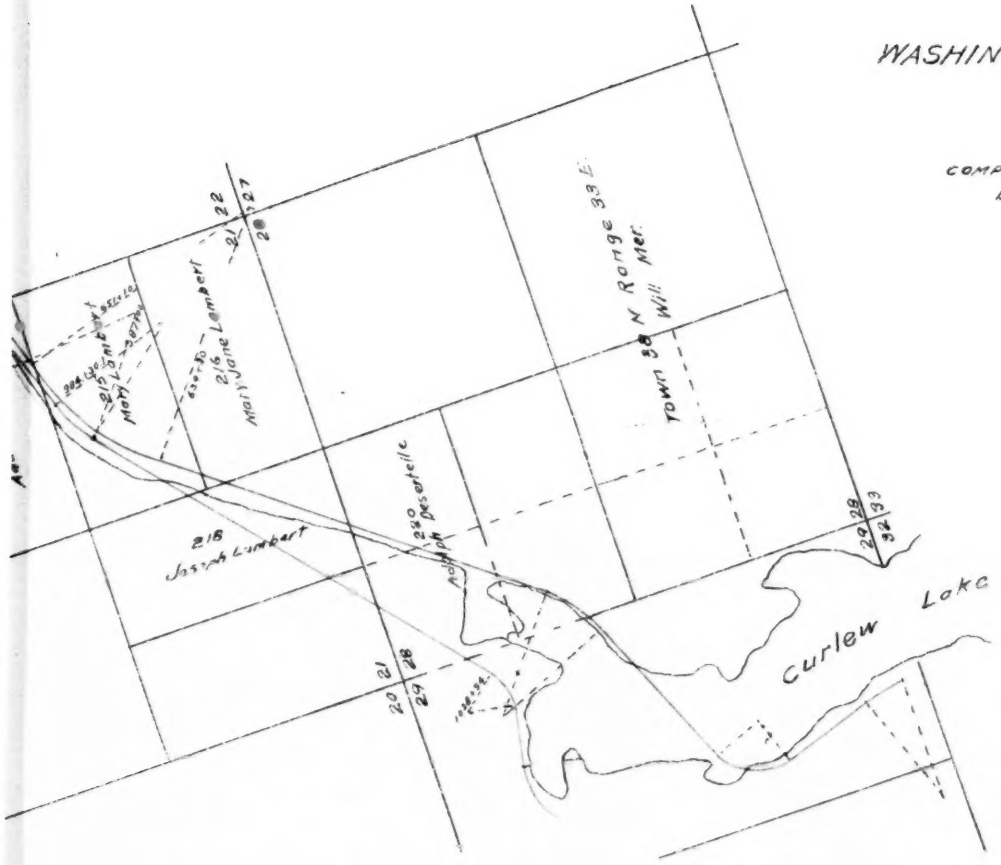
SCALE 1" = 800'



Supreme Court of the United States

OCTOBER TERM, 1909.

No. [redacted] 49.

THE SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY, Plaintiff in Error,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, et al.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

W. T. BECK,
W. C. KEEGIN,
Counsel for Plaintiff in Error.

A. M. CRAVEN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1909.

THE SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY, Plaintiff in Error,

vs.

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, et al.

No. 225.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On June 4, 1898 (30 Stat., 430), Congress passed the following Act, to wit:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there is hereby granted to the Washington Improvement & Development Company, a corporation organized and existing under the laws of the State of Washington, and to its assigns, a right of way for its railway, telegraph, and telephone lines through the Colville Indian Reservation, in the State of Washington, beginning at a point on the Columbia

River, near the mouth of the Sans Poil River; running thence in a northerly direction to a point in township thirty-seven north, of range thirty-two east, Willamette meridian; thence northerly to a point near the mouth of Curlew Creek; thence northerly to the international boundary line between British Columbia and the State of Washington; with the right to construct, use, and maintain such branches, spurs, switches, and side-tracks as said company may deem necessary for the operation of said railway, together with all the rights granted to railroads by the Act of Congress entitled 'An Act granting to railroads a right of way through the public lands of the United States,' approved March third, eighteen hundred and seventy-five. Such right-of-way shall be fifty feet wide on each side of the center line of said railroad, and said company shall have the right to take from the lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also grounds adjacent to such right-of-way for station buildings and for necessary side tracks and switch tracks, not to exceed in amount two hundred feet in width and two thousand feet in length for each station, and to an extent not exceeding one station for each ten miles of road within the limits of said Colville Reservation.

"Sec. 2. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid to any Indian allottees whose lands may be taken by said company under this Act, and to provide the time and manner of payment thereof.

"Sec. 3. That said company shall cause maps showing the route of its located lines through said Colville Reservation to be filed in the office of the Secretary of the Interior; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right-of-way shown by said maps shall be valid as against said company: *Provided, That when a map showing any portion of said railway company's located line is filed herein as provided for, said company shall commence grading said located line within six months*

thereafter, or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before the construction of any such section shall be begun.

"Sec. 4. That said company is hereby authorized to enter upon said reservation for the purpose of surveying and locating its line of railroad.

"Sec. 5. That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this Act.

"Sec. 6. That Congress reserves the right to alter, amend, or repeal this Act in whole or in part." (The italics are ours.)

Maps of a located line were filed under said Act by the Washington Improvement & Development Company, one of the defendants in error, and approved in June, August and November, 1899, by the Secretary of the Interior, subject to the limitations and provisions of said Act; the said company never commenced construction or other work upon the said right-of-way, nor did its successor, the Washington & Great Northern Railway Company, defendant in error, until July, 1906. The maps so approved to the Washington Improvement & Development Company traversed the Colville Indian Reservation from the mouth of the San Poil to the International boundary line between British Columbia and the State of Washington, a distance of ninety miles, more or less; the part directly involved in this case being the southerly half of said right-of-way, from Republic to the Columbia River.

Court Findings, Par. 6, Trans., p. 16; Par. 3, Trans., p. 18; Deed, Trans., pp. 28 and 29.

In the year 1901, the plaintiff in error, under its then corporate title of Republic and Kettle River Railway Com-

pany, filed with the Department of the Interior certain maps of location of a line of railway from the International boundary line south, through the Colville Indian reservation to Republic, a distance of about forty miles, said maps being duly approved by the Secretary of the Interior, April 23, 1901, under the Act of March 2, 1899 (30 Stats., 990), being an Act granting rights-of-way to railway companies through Indian reservation, etc.; the line so approved being in conflict with the approved line of said Washington Improvement & Development Company for a distance of fully 10 miles; such approval was made by the Secretary of the Interior without protest on the part of the Washington Improvement & Development Company, and was made by the Secretary on investigating and ascertaining the fact that the said company had not commenced construction or other work on its said approved line within six months, as provided by the Act of June 4, 1898, or at all, since the approval of its maps in 1899, to said year 1901.

See—

Change of Corporate name, Trans., p. 30.

Protest Proceedings, Department of Interior, Trans., pp. 30 to 37, inclusive.

Maps, Plaintiff in Error Exhibits Nos. 85 and 86 Attached to Transcript.

Testimony S. H. Richardson, Trans., pp. 41 to 44, inclusive.

In the fall of the same year, to wit, 1901, and subsequent to the approval of the said right-of-way to plaintiff in error, the defendant in error, the Washington & Great Northern Railway Company, made application to the Secretary of the Interior, under Act of March 2, 1899, *supra*, for approval of its certain maps of location, showing a line of road from the said international boundary line to Republic, crossing and recrossing and paralleling within ten miles the approved

line of plaintiff in error; to which application, plaintiff in error entered a formal protest on the ground such line was in conflict with its approved line of road and which was then in course of construction, and that the application of said Washington & Great Northern Railway Company could not be allowed under said Act of March 2, 1899, which forbid a parallel line within 10 miles of a line constructed, or in course of construction, unless, in the opinion of the Secretary of the Interior, it would promote the public interest. A hearing was duly had before the Secretary on such protest, resulting in the approval of the maps of the said Washington & Great Northern Railway Company under the Act of March 2, 1899, subject to the approved rights of plaintiff in error. The maps so approved to the defendant in error, the Washington & Great Northern Railway Company, were also in conflict with the line approved to the Washington Improvement & Development Company, but no appearance or protest was made or entered by said company at the said hearing.

See—

Protest Proceedings, Department of the Interior, Trans., pp. 30 to 37, inclusive.

Maps, Plaintiff in Error, Exhibits Nos. 85 and 86 Attached to Transcript.

Testimony, S. H. Richardson, Trans., pp. 41 to 44, inclusive.

The plaintiff in error, and defendant in error, the Washington & Great Northern Railway Company, duly constructed competing lines of railway in the years 1901-2 over and upon the rights-of-way so approved to them under the Act of March 2, 1899 (30 Stats., 990), from Grand Forks, B. C., near the International boundary line, to Republic, in the State of Washington, and which, for a distance of ten miles or more, covered the identical line and right-of-way

approved to the Washington Improvement & Development Company in 1899, under the Act of June 4, 1898; and in the following years of 1903-4, the said defendant in error, the Washington & Great Northern Railway Company, constructed its present line of road under approval of the said Act of March 2, 1899, from Curlew on the Kettle River north to the international boundary line at Ferry, a distance of 14.54 miles over the identical line and right-of-way approved to said Washington Improvement & Development Company in the year 1899 under said Act of June 4, 1898; and that said constructed roads have ever since been, and now are in operation by said companies as common carriers of passengers and freight.

Court Findings, Par. 1, Trans., pp. 14 and 17.

Maps, Exhibits Nos. 84, 85 and 86, Plaintiff in Error, Trans., p. 52.

Testimony, S. H. Richardson, Trans., pp. 41 to 44, inclusive.

In the year 1905, the plaintiff in error, with a view to extending its said line of railway from Republic to the City of Spokane, by way of the south half of the Colville Indian Reservation, and in accordance with a resolution of its Board of Directors, made application to the Secretary of the Interior for approval of certain maps of location through the south half of the Colville Indian Reservation, from Republic to the Columbia River, asking approval under said Act of March 2, 1899, and which maps were duly approved in October, 1905. The located line, according to said approved maps, was in conflict with, and for long distances, the identical line approved to the Washington Improvement & Development Company, under the Act of June 4, 1898, and this is the part of said line directly involved in the case at bar. No objection or protest was made or entered by said defendant in error, the Washington Improvement &

Development Company, to the approval of the maps of right-of-way to plaintiff in error. The Department of the Interior, exercising jurisdiction under the Act of June 4, 1898, as well as the Act of March 2, 1899, since the approval of the maps of right-of-way to plaintiff in error in April, 1901, over the northerly half of said line, and the said approval in October, 1905, over the southerly half thereof, steadily refused to recognize the claims of defendants in error to any part of the right-of-way under Act of June 4, 1898.

Court Findings, Trans., pp. 14 to 16, inclusive.
Letter Commissioner Indian Affairs, Trans., pp. 38 to 40, inclusive.

In July, 1906, plaintiff in error commenced construction of its line over said Colville Reservation, according to its approved plats, and in compliance with the Act of March 2, 1899; whereupon, the defendant in error, the Washington & Great Northern Railway Company, also commenced construction of a railroad upon the identical line and right-of-way so approved to plaintiff in error, such company claiming a prior right to said right-of-way, by virtue of a deed under date of July 20, 1906, from defendant in error, Washington Improvement & Development Company.

Court Findings, Par. 3, Trans., p. 15, and Par. 6, Trans., pp. 19 and 20.

Whereupon, this action was instituted in the Superior Court of the State of Washington, for Ferry County, for a perpetual injunction against the said defendants in error, the Washington & Great Northern Railway Company, Washington Improvement & Development Company and the other defendants in error, who were the servants and employees of said company, enjoining them from in any manner interfering with its approved right-of-way from Re-

public to the Columbia River, and to the City of Spokane, or any part of its right-of-way duly approved to it across the public lands of the United States and Indian Reservations, under the Acts of Congress relative thereto.

Trans., pp. 2 to 6, inclusive.

The defendants in error set up an affirmative defence or cross-complaint, whereby they claimed title to the identical right-of-way claimed by plaintiff in error, by reason of the special Act of Congress, approved June 4, 1898. (Trans., pp. 7 to 11, inclusive.) Thus the issue was squarely made; both parties claiming title to the right-of-way in question, the plaintiff in error under and by virtue of a compliance with the general acts of Congress relative to the acquisition of rights-of-way over public lands and Indian lands, and the defendants in error, under and by virtue of the special Act of Congress of June 4, 1898.

It was also claimed by the plaintiff in error, that if, as a matter of fact and law, the defendant, the Washington & Great Northern Railway Company, had acquired the right-of-way under said Act of June 4, 1898, the same had been abandoned, and evidence was introduced at the trial showing such abandonment.

Upon the trial of the case it was determined by the Court that the plaintiff in error had complied in every respect with the Acts of Congress relative to the acquisition of rights-of-way over public and Indian lands, and that the Washington Improvement & Development Company, the grantee named in the Act of Congress of June 4, 1898, had not complied with conditions precedent to the vesting of title under said Act, in that it did not commence work within six months after filing and approval of the maps, as provided in said Act; consequently, the rights of plaintiff in error were superior and judgment was entered accordingly. On appeal to the Supreme Court of the State of Washington, judg-

ment of the lower Court was reversed, upon the ground that the Act of Congress of June 4, 1898, was a grant *in praesenti* on conditions subsequent and was valid until set aside at the instance of the United States.

Findings and Judgment, Lower Court, Trans., pp. 20 to 22, inclusive.

Judgment State Supreme Court, Trans., pp. 22 to 27, inclusive; 49th Wash. Reports, p. 280.

A writ of error was granted by the Chief Justice of the Supreme Court of the State of Washington to this Court.

The plaintiff in error filed in the Supreme Court in support of said Writ of Error the following:

ASSIGNMENTS OF ERROR.

"And now, before the Justices of the Supreme Court of the United States of America, at the Capital, in the City of Washington, comes the Spokane & British Columbia Railway Company, a corporation, plaintiff in error, by its counsel, in the above entitled case and in connection with its petition for a Writ of Error, makes the following assignment of errors, which it avers occurred on the trial of said case in the Supreme Court of the State of Washington, to wit:

"1. The Court erred in holding that the Act of Congress of June 4, 1898, under which defendants in error claim, constituted a grant *in praesenti*.

"2. The Court erred in holding that the title to the right-of-way vested in the Washington Improvement & Development Company, upon the filing and approval of its maps of location.

"3. The Court erred in holding that the Washington Improvement & Development Company, or its successors or assigns ever acquired any interest in said right-of-way.

"4. The Court erred in holding that the provision of said Act of Congress that said 'located line should be

void unless grading be commenced within six months' was a condition subsequent.

"5. The Court erred in not holding that all rights acquired by the Washington Improvement & Development Company or its successors in interest under the Act of June 4, 1898, had been abandoned, as fully appears in the Statement of Facts and Bill of Exceptions presented to said Court on said appeal.

"6. Lastly, the Court erred in rendering and entering its judgment in said case in favor of the defendants in error and against the plaintiff in error, and in remanding and reversing the judgment of the lower Court.

"Wherefore the said, the Spokane & British Columbia Railway Company, prays that the judgment and decision aforesaid may be reversed, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the said judgment and decision."

ARGUMENT.

By this Writ of Error, two questions are presented:

First. Did the defendant in error, the Washington Improvement & Development Company, acquire a vested interest in the right-of-way by virtue of the location approved under the Act of June 4, 1898?

Second. If same was acquired under said Act, was the same abandoned, or is not the company or its successor estopped from claiming any rights thereunder because of its acts and omissions in the face of the intervening approval to plaintiff in error of the same right-of-way.

I.

Plaintiff in error contends that defendants in error never acquired any vested interest in the particular strip of ground or right-of-way contended for in this case, for the reason the location of such right-of-way made and approved under the Act of June 4, 1898, was rendered void for failure to

commence grading or other work on such location within six months after the filing of the maps showing such location, as required by Sec. 3 of the Act; in fact, no work was commenced until July, 1906, subsequent to commencement of construction by plaintiff in error under maps approved to it in October, 1905.

Plaintiff in error claims this right-of-way under the maps so approved to it; and submits the location made and approved to defendant in 1899 under the Act of June 4, 1898, and relied upon by the defendants in error is void, and therefore ineffectual to divest the Government of title, and that such location must fail against the approved grant to plaintiff in error under Act of Congress March 2, 1899 (30 Stats. L., 990), and that such location is so void for failure to commence work, without further act or declaration on the part of the United States other than is contained in the granting act, and that, therefore, no question of the *forfeiture* of a *vested grant* is involved in this case.

Nor in our view of the case is there any conflict with the cases cited by the Supreme Court of the State of Washington in support of its decision in this case. We contend that those cases are not applicable to the facts in this case or to a correct interpretation of the Act of June 4, 1898. In all the cases cited by said Court, the question of forfeiture of a grant is discussed, but under Acts of Congress entirely lacking in the provision as to location and commencement of work found in Section 3 of the Act of June 4, 1898. Such a clause or its equavelent is not found in any of the acts construed by the cases cited. Said Section 3 states the plain intent of Congress that the location without commencement of work is void, and therefore insufficient to divest the Government of title. If this view be correct, no question of forfeiture of the *grant* is involved in this case as in the cases cited by the said Supreme Court, but simply the validity of the particular *location* under the grant.

The question at the threshold of this case is, was the location relied upon and claimed under said Act of June 4, 1898, void *ipso facto* or not? Did failure to begin work vitiate the location as provided in the act, or is some further act or declaration on the part of the United States necessary, to render the location void? A reading of the act will show that Congress intended that before the grant should attach, maps showing location must be filed, but such location was to be of no effect without commencement of work. The doing of two things by the grantee were essential to divest the Government of title, to wit, location and commencement of work, the former without the latter to be void.

Congress assumed, and we believe rightly, that a void location could not vest the grant to the exclusion of others desiring to occupy and use such right-of-way under other Acts of Congress; that is, Congress intended and so provided, that failure to commence work should render the location made void *ipso facto*, and so reduce the grantee to the position held at the time of the passage of the act and prior to location, which was the holding of a floating unfixed grant and no more, the clear intention of Congress being that the grantee could not merely locate the line and without construction hold it to the exclusion of everyone else. This is the very emergency Congress evidently sought to guard against and prevent.

We submit that none of the cases cited by the State Supreme Court, nor any other case that we can find, holds that proceedings in forfeiture must be had, or that some further act or declaration is necessary to vitiate a location made and claimed as under the act of June 4, 1898, *supra*, and we contend that the location thereunder is void for failure to *begin* work, because the act so provides; that Congress in so providing clearly intended the location should not vest the title to the strip shown by maps of location without the commencement of work within the time provided by the

Act, and that such should be the effect without further act or declaration.

To say that the commencement of grading, as well as the completion of work, is a condition subsequent, is to read a meaning into the statute contrary to its plain language; it is to give effect to the location regardless of commencement of work in the face of the provision that the location should be of no effect on failure to begin work.

We urge that location, approval thereof by the Interior Department, and commencement of work within the time provided is essential to the fixing of the grant, and that the failure of the latter element renders the approved location a mere nullity, relegating the grantee desiring to further avail itself of the grant to a new location, which would be subject to intervening adverse rights. No other view comports with the expressed will of Congress in Section 3 of the Act.

The term "forfeited" implies the extinguishment of a vested grant or interest, or a right thereto. In Section 5 of the act under consideration, the word "forfeited" is used in connection with the term "rights herein granted," and for failure to *complete* work. The word "void" is used in connection with the *located line*, but not in connection with the rights granted. There is in this Act but one ground of forfeiture of the grant and that is for failure to complete certain portions of the road within the time specified. Failure to begin work is not a ground of forfeiture of the *grant*, but renders the *location* void. It seems plain that Congress did not intend the Government to be required to institute forfeiture proceedings in order to vitiate the located line in this case for failure to begin work, but that forfeiture proceedings could and would only be required to secure a declaration of forfeiture in case of failure to complete certain portions of the road within the time required.

The fact that words of grant are found in the Act of June 4, 1898, does not make the case other than one of statutory construction. Although a statute may contain the elements of a compact between the Government and an individual, nevertheless it should be construed according to the rules for construction of statutes and not according to those for construction of contracts.

Black, Interpretation of Laws, page 315.
Schulenberg vs. Harriman, 21 Wall., 44.
5 Thompson on Corporations, p. 5195, Sec. 6588.

A strict construction in favor of the Government is demanded by public policy.

Sutherland Stat. Const., Sec. 378.
Black, Interpretation, page 315.
Rice vs. Minn. & N. W. R. R. Co., 66 U. S., 358.
Railroad Co. vs. Litchfield, 23 How., 66.

It is not material to this inquiry that the words "there is hereby granted" are used. The use of such language could hardly be avoided. Acts containing such or other language importing a grant *in praesenti*, have been construed not to be grants *in praesenti*, and *vice versa* acts without any terms of conveyance at all have been construed to be grants *in praesenti*.

Of the latter class is the Act involved in the New York Indians vs. U. S., 170 U. S., 1, where the language used is "agree to set apart." The Court in that case announced the following rule: "The proper construction to be placed upon similar clauses was the subject of consideration by this Court in several cases before the railroad land grant cases, and the conclusions reached that, if from all the language of the statute or treaty it was apparent that Congress intended to convey an immediate interest, it will be construed as a grant *in praesenti*."

Of the former class of cases is the case of Heydenfeldt vs. The Daney Gold & Silver Mining Company, 93 U. S., 634. The granting clause of the statute there construed was that "sections numbered sixteen and thirty-six in every township * * * shall be and are hereby granted to said State," etc. But the Court was not controlled by the use of language which simply imported a present grant, but looked to the entire Act to ascertain the intention of Congress, and said:

> "It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Sharswood, Judge, 'to adhere to a plain commonsense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.' Gyger's Estate, 65 Pa. St., 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results and be contrary to the evident meaning of the act taken as a whole, it will be rejected; and there is no better way of discovering the true meaning of a law when there are expressions in it which are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced the legislature to pass it."

In view of a construction of the Act of June 4, 1898, *supra*, we wish to here remark that it is significant that no provision making a location void for failure to commence work is found in the general railroad right-of-way Act of March 3, 1875 (18 Stats., 482), granting rights-of-way through public lands of the United States, while such a provision, as well as a provision for forfeiture, is found in many acts of Congress granting rights in Indian reservations. Does not the occupancy of such reservations by per-

sons under the guardianship and surveillance of the Government explain this? The Government, in its administration of Indian Affairs, has regulated the intercourse between the Indian and the white, and by a careful code of rules has directed the management of said Indians, always a difficult matter. They are extremely jealous of their rights and suspicious of all actual or imaginary encroachments thereupon; hence there is good public policy in the enactment of these clauses which differentiate said acts from the acts granting rights-of-way through the public lands generally, and such public policy should be observed by the courts in construing these acts.

The Act of February 28, 1902 (32 Stat., 43), granting a right-of-way through the Indian Territory, is identical with the act under consideration, so far as the question at issue is concerned. (See Secs. 6 and 9, page 46, of said Volume of the Statutes.)

Section 6 of the Act of February 18, 1888 (25 Stat., 35), granting a right-of-way to the Choctaw Coal & Railway Company through the Indian Territory, is also identical, and we find that said section was the subject of judicial consideration by the Supreme Court of Oklahoma in the case of United States vs. Choctaw A. & G. R. Co. (3 Oklahoma Reports, 404). The decision in that case seems rather complex because of its great length and the numerous questions discussed, but as we read and understand the decision, it distinctly, and necessarily, held, among other things, that a location made under said act, though subsequently approved by the Secretary of the Interior, was ineffective by reason of the fact that the company had failed to commence grading on the location within six months thereafter, as expressly provided by the act (see pages 490 and 491); and it was concluded, in effect, that the approval by the Interior De-

partment of a new map of the line of road by the successor of the original grantee was a nullity, so far as said approval applied to the original location shown on the map, on which grading had not been done as required by the statute—in short, the decision of the Court was that the location originally made had lapsed and became void for failure to comply with the terms of the statute in the matter of commencement of grading of the location, and that therefore that location could not be revived through an approval of the line by the Interior Department, or interfere with such rights the grantee might have independent of the original grant.

The Supreme Court of Connecticut, in the case of the New York, Etc., Railway Company vs. The Boston, Hartford & Erie Railway Company, 36 Conn., 196, in construing a statute of that State providing that in case any railway company should not, within twelve months after the acceptance of its route by the Commissioners, procure and pay for the right-of-way over all lands covered by the location, acceptance by the Commissioner should be void, held that such failure to procure and pay for the right-of-way was not in the nature of a forfeiture to be taken advantage of only by the State in a direct proceeding against the company, but that the whole proceedings became of no effect upon the expiration of twelve months.

The Court also said:

> "The principal and perhaps the only object which the legislature had in view was to prevent such surveys from being a cloud upon the title to real estate an unreasonable length of time."

Again the Court says:

> "No good reason can be suggested why the petitioners should have an indefinite length of time after the passage of the Act in which to procure a right-of-way,

> while other companies, whose surveys were approved, should have only twelve months. * * * The case then is brought within the spirit of the Act, and, it being a remedial statute, we think it is our duty so to construe it as to apply the remedy and suppress the mischief."

The foregoing Connecticut case, with others, is cited by Mr. Thompson in his Commentaries on the Law of Corporations, Vol. 5, Sec. 6586, page 5193, where the point is referred to. See also Secs. 6587, 6588 and 6589.

Of all the cases cited by the State Supreme Court there are but two involving Acts of Congress which grant a right-of-way solely, the principal one being the case of Railroad Company vs. Alling, 99 U. S., 463, which case involves the Act of Congress of June 8, 1872 (17 Stat. L., 339), granting to the Denver & Rio Grande Railroad Company its right of way. It will be observed the Act construed in that case does not provide that the rights and privileges granted should be forfeited, but that same "shall be rendered null and void," and the grant did not apply to Indian reservation lands, or contain any such preliminary requirement, or penalty, as did the act in the case at bar.

The Supreme Court gives to the language used its ordinary meaning, saying:

> "The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fe, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, *it is solely by reason of such extension that the Denver Company had the right, on the 19th of April, 1878, to take possession of the Grand Canyon, and prepare for the final location and construction of its road through that pass,"*

and the Court recognized intervening adverse rights under the subsequent general Act of 1875.

A like proviso receives the same construction in the case of United States vs. D. & R. G. R. Co. (150 U. S., 1), which was a suit brought by the United States, not to forfeit any rights granted to the defendant, but to recover from the defendant the value of certain timber cut on land adjacent to a line of railroad. The defendant, as appears in the statement of the case, justified the taking of the timber under the special Act whereby its rights were granted, as well as under the general Act of March 3, 1875. The Court held that it was entitled to take the timber under the general Act of March 3, 1875, for the reason that all its rights under the special Act had terminated by reason of its failure to construct the road within the time provided in said Act. We call attention to the following language of the opinion on page 9:

> "No reason is perceived why the defendant, after its rights under the special Act had terminated, should not be permitted to take the benefits of the general law of 1875, as far as it related to the construction of its line west of Cebolla, and built after June 8, 1882, when its right to take material for construction ceased under the Act of 1872."

Again at page 7:

> "As shown by the agreed Statement of Facts, the railway company on June 8, 1882, had completed its line westward only as far as Cebolla, Colo., and has never completed it to Santa Fe. The right of the railway company, under the special Act of 1872, to take timber west of Cebolla for the construction of its line, accordingly terminated on June 8, 1882. The timber in controversy was taken after that date from the vicinity of Montrose, Montrose County, Colo., some forty-five

> miles west of Cebolla, and is justifiable, on the part of the defendant, only under the Act of March 3, 1875, if it is entitled to the benefits of that Act."

So these cases, when fully analyzed do not, as we claim, furnish proper warrant for the conclusion of the Court below.

The other case cited by the State Supreme Court involving a grant of right-of-way only, is that of Noble vs. Union River Logging Railroad Company, 147 U. S., 165, 176. That case construes the Act of March 3, 1875 (18 Stats., 482), which contains no provision whatever as to location and commencement of work, as provided in the Act of June 4, 1898, *supra*, and has no reference to Indian lands.

As already stated, we make no attempt to come in conflict with the cases cited by the State Supreme Court, but we insist those cases do not construe acts that are at all similar to the Act under consideration. One of the principal cases, if not the principal case cited, and which is followed by other cases cited, is that of Schulenberg vs. Harriman, 21 Wall., 44. In that case the Court had under consideration an act granting lands to the State of Wisconsin to aid in the construction of a certain road. The Act provided for the filing of maps of location, but made no further provision affecting such location shown by the maps. The Court held that upon the filing of the maps showing the surveyed route of road the grant attached to the lands granted; but here it must be borne in mind that the location was all the Act required to the vesting of the grant, and the power to select and dispose of the lands was expressly given on the filing of the maps showing the location of the road. No attack was made on the location, and there was no provision in the Act declaring such location void on failure to commence work on the location within a specified time; nor did the Act in that case fix a time for the com-

mencement of work, nor was a right-of-way involved in the case. There was good reason why title to the lands granted to aid in the construction of the railroad should be deemed vested on filing maps of location, as the lands were granted to aid in the building of the road, and for the Court to hold otherwise would have been not only contrary to the plain provisions of the Act, but would have resulted in depriving the grantee of the aid given at the time of building the road.

The case of Bybee vs. Oregon Railroad Co., 139 U. S., 663, and the case of Railway vs. Baldwin, 103 U. S., 426, construe acts containing, as the Court says in the Baldwin case: "Two grants, a grant of lands to aid in the construction of the road, and a grant of the right-of-way," and there were no such provisions in the acts making the grants as in the case at bar.

The Court's decision in the Baldwin case was based on the fact that the grant of the right-of-way was without any conditions, restrictions or limitations, except, of course, construction and use of the road.

From a reading of the cases cited by the State Supreme Court, it will be seen that but little aid is given in construing the Act involved in the case at bar; but from a reading of said cases it does appear that the thought was always in the minds of the Court to construe the Act according to the intent of the maker, and in so doing consideration was given not only to the granting clause, but to all parts of the statute and in view of all the circumstances of the case.

II.

Without conceding the right-of-way in question was ever acquired, we submit that if acquired, it has been abandoned, and that such abandonment was long prior to the deed from the grantee to the defendant in error, the Washington & Great Northern Railway Company, dated July, 1906. And

further, that defendants in error are, under the circumstances of this case, estopped from claiming this right-of-way.

The facts on this point show a non-user and an abandonment of the line located under the Act of June 4, 1898, long prior to July, 1906, the date of the deed from the grantee to the defendant in error, The Washington & Great Northern Railway Company, and prior to the location and approval of the line to plaintiff in error under Act of March 2, 1899, *supra*. The grantee not only failed to commence work as provided by the Act, but failed to enter upon the located line for any purpose; and notwithstanding the location and construction of two lines of railway on the northerly half of its grant in the years 1901-2-3 and 4, under the said Act of Congress of March 2, 1899, and notwithstanding the said approval of the maps of plaintiff in error in October, 1905, and which approval covered the southerly half of its line, to wit, from Republic to the Columbia River, said grantee made no protest and paid no heed thereto until the date of its deed to defendant in error, the Washington & Great Northern Railway Company, in July, 1906, and at the time of commencement of construction by the plaintiff in error.

We submit these facts warrant a finding that the Washington Improvement & Development Company abandoned all intention of constructing a railroad on the location made and approved to it under the Act of June 4, 1898, and that such abandonment was prior to its attempted transfer of July, 1906. Therefore, that defendants in error should, under the circumstances of this case, be held estopped from claiming this right-of-way, approved to plaintiff in error under the Act of March 2, 1899.

Roanoke Inv. Co. vs. Kansas City & S. E. R. Co.,
17 Southwestern Repts. (Mo.), 1000.

Jones vs. Van Bochove, 61 N. W., 342 (Mich.).
Blakely vs. Chicago K. & N. R. Co., 64 N. W., 972 (Neb.).

The abandonment is more readily presumed where the easement is granted for a public benefit, than where held for private use; and when such right has been abandoned the State may grant it to another corporation.

Henderson vs. Cent. Pass. Ry. Co., 21 Fed., 358.

Whether the grant be one in fee or an easement merely, it is subject to the condition that it be appropriated and used for the purpose designed.

Denver & Rio Grande R. R. Co. vs. Alling, 99 U. S., 463.
Railroad Company vs. Baldwin, 103 U. S., 426.

The defendant in error, the Washington & Great Northern Railway Company, is bound by the abandonment of its predecessor.

Westcott vs. New York & N. E. R. Co., 25 N. E., 840 (Mass.).

The defendants in error cannot be given possession without great injustice to plaintiff in error, who has acted, with the sanction and approval of the Department of the Interior and under a general Act of Congress upon the faith that the location was abandoned, and upon the appearance of abandonment, and defendants in error should be estopped from now claiming what it had abandoned, and led others to believe was abandoned.

White's Bank of Buffalo vs. Nichols, 64 New York at p. 74.

It is accordingly submitted that the judgment of the Supreme Court of the State of Washington, reversing the judgment of the Superior Court of said State, should be reversed.

Respectfully submitted,

W. T. BECK,

W. C. KEEGIN,

Counsel for Plaintiff in Error.

A. M. CRAVEN,

Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 225.

THE SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY,

Plaintiff in Error,

against

THE WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY, THE WASHINGTON IMPROVEMENT AND DEVELOPMENT COMPANY, JOHN HUGHES, ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR DEFENDANTS IN ERROR.

The facts involved in this action are as follows:

By the Act of Congress approved June 4, 1898 (30 Stats. 430), there was granted to the the defendant in error, the Washington Improvement and Development Company, and to its assigns, the right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation, in the State of Washington. The Act of 1898 is as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That there is hereby granted to the Washington Improvement and Development Company, a corporation organized and existing under the laws of the State of Washington, and to its assigns, a right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation in the State of Washington, beginning at a point on the Columbia River, near the mouth of the Sans Poil River; running thence in a northerly direction to a point in Township thirty-seven North, of Range thirty-two east, Willamette Meridian; thence northerly to a point near the mouth of Curlew Creek; thence Northerly to the International Boundary line between Brit sh Columbia and the State of Washington; with the right to construct, use and maintain such branches, spurs, switches, and side tracks as said Company may deem necessary for the operation of said railway, together with all the rights granted to railroads by the Act of Congress entitled 'An Act granting to railroads a right of way through the public lands of the United States,' approved March third, eighteen hundred and seventy-five. Such right of way shall be fifty feet wide on each side of the center line of said railroad, and said Company shall have the right to take from the lands adjacent to the line of said road material, stone, earth and timber necessary for the construction of said railroad; also grounds adjacent to such right of way for station buildings and for necessary side tracks and switch tracks, not to exceed in amount two hundred feet in width and two thousand feet in length for each station, and to an extent not exceeding one station for each ten miles of road within the limits of said Colville Reservation.

Section 2. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid to any Indian allottees

whose lands may be taken by said Company under this Act, and to provide the time and manner of payment thereof.

Section 3. That said Company shall cause maps showing the route of its located lines through said Colville Reservation to be filed in the office of the Secretary of the Interior; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said Company: PROVIDED, That when a map showing any portion of said railway company's located line is filed herein as provided for, said Company shall commence grading said located line within six months thereafter, or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before the construction of any such section shall be begun.

Section 4. That said Company is hereby authorized to enter upon said reservation for the purpose of surveying and locating its line of railroad.

Section 5. That the right herein granted shall be forfeited by said Company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this Act.

Section 6. That Congress reserves the right to alter, amend, or repeal this Act in whole or in part."

Pursuant to the requirements of Section three of said Act, the Washington Improvement and Development Company duly surveyed and located its line of railway upon the route described in the act, and filed maps thereof in the office of the Secretary of the Interior, which maps were approved by the Secretary under said act on and prior to November 27, 1899.

During the year 1900, the lands lying in the north half of the Colville Indian Reservation, that is, north of the township line between Townships thirty-four and thirty-five North, Williamette Meridian, were pursuant to the provisions of the Act of Congress of July 1, 1892 (27 Stats. 62), except such as had been allotted in severalty to individual Indians, or reserved for other purposes, opened to settlement and entry under the public land laws.

During the years 1901 and 1902, the defendant in error, the Washington and Great Northern Railway Company, located and constructed a line of railway from Marcus, in the State of Washington, to a point on the International boundary line, and from another point on said boundary line, along the Kettle River and Curlew Creek, to the village of Republic, in the County of Ferry, State of Washington. The line so constructed lies North of Republic, and north of the right of way in controversy in this action and is in no way involved herein.

During the years 1904 and 1905, the plaintiff in error, the Spokane and British Columbia Railway Company, hereinafter called the plaintiff, surveyed and located a line from Republic, down the valley of the Sans Poil River, to a point on the Columbia River, and thence to the City of Spokane, in the State of Washington, and duly filed in the office of the Secretary of the Interior maps thereof as required by the provisions of the Act of Congress of March 3, 1875, granting to railroad companies the right of way through the public lands, and the Act of March 2, 1899, granting rights of way to railway

companies through Indian Reservations and Indian lands. Said maps were thereafter duly approved by the Secretary of the Interior; those relating to the public lands having been approved December 4, 1905, and those relating to the Colville Indian Reservation October 17, 1905. From a point near Republic to the Columbia River, at the mouth of the Sans Poil River, the line indicated upon the approved maps of the plaintiff is located substantially upon the approved line of the Washington Improvement and Development Company, and along and upon the right of way granted therefor by the Act of 1898.

On June 30, 1906, the Directors of the defendant in error, the Washington and Great Northern Railway Company, duly adopted a resolution whereby it was resolved that said Company survey, locate, construct and operate a branch line of railway commencing at a connection with the company's existing line of railway at or near Republic, in the County of Ferry, State of Washington, and extending thence through the said County of Ferry in a southerly and southeasterly direction to a point on the north bank of the Columbia River, at or near Hellgate in said County of Ferry, which resolution was duly filed in the office of the Secretary of State of the State of Washington.

By deed bearing date July 20th, 1906, the Washington Improvement and Development Company conveyed to the Washington and Great Northern Railway Company, its successors and assigns, all the rights, privileges, immunities and property ac-

quired by the Improvement and Development Company by virtue of the Act of Congress approved June 4, 1898, and the filing and approval of its maps thereunder, including the right of way involved herein.

Neither the Washington Improvement and Development Company, nor the Washington and Great Northern Railway Company, commenced grading the located line of the former within six months after the approval of the map thereof by the Secretary of the Interior, nor did said Companies, or either of them, construct twenty-five miles of said railway, or any part thereof, through the Colville Indian Reservation, within two years after the passage of the Act of 1898.

During the month of July, 1906, the defendant in error, the Washington and Great Northern Railway Company, commenced the construction of its proposed branch railway from Republic to the Columbia River upon the located and approved line formerly owned by the Improvement and Development Company, and along and upon the right of way pertaining thereto, whereupon the plaintiff commenced an action in the Superior Court of the County of Ferry, State of Washington, against the Washington and Great Northern Railway Company and the Washington Improvement and Development Company and others, engineers and contractors of the Washington and Great Northern Company, to enjoin the construction of said railway. The matter was duly brought on to be heard and a decree was entered that the plaintiff, the Spokane & Brit-

ish Columbia Railway Company, was the owner and entitled to the possession of the right of way involved and that the defendants had no right, title or interest therein, and perpetually enjoining the defendants from entering upon said right of way, or any part thereof, or in any manner interfering with the possession thereof by the plaintiff. Defendants duly appealed to the Supreme Court of the State of Washington, where the decision of the Superior Court was reversed, whereupon plaintiff brought the case to this Court by writ of error.

The Supreme Court of the State of Washington held that the grant made to the Washington Improvement and Development Company, by the Act of June 4, 1898, was a grant in praesenti; that when the map of definite location of its railway line was approved by the Secretary of the Interior, the Company's right attached and the title to the particular strip of land indicated by the map vested in the Company; that the conditions contained in Sections three and five of the Act of 1898, were conditions subsequent; that upon the failure of the Company to comply with either of these conditions, the United States by a judicial proceeding, or by an Act of Congress, or possibly other appropriate proceedings, could have declared a forfeiture and made a reentry, but that until this was done the title remained in the Company and could not be disturbed by the plaintiff or any third party.

I.

THE GRANT MADE BY THE ACT OF JUNE 4, 1898, IS A GRANT IN PRAESENTI. IT PASSED TO THE WASHINGTON IMPROVEMENT AND DEVELOPMENT COMPANY A PRESENT INTEREST IN THE RIGHT OF WAY GRANTED, REQUIRING ONLY A DEFINITE LOCATION OF THE LINE OF RAILWAY TO IDENTIFY THE LANDS GRANTED. WHEN THE LINE OF THE PROPOSED RAILWAY WAS DEFINITELY LOCATED, AND A MAP THEREOF FILED WITH AND APPROVED BY THE SECRETARY OF THE INTERIOR, THE TITLE TO THE LANDS GRANTED VESTED IN THE GRANTEE AS OF THE DATE OF THE GRANTING ACT.

The language of the first section of the act is, "That there is hereby granted," and this Court has held in numerous cases involving the construction of Acts of Congress granting rights of way and lands to aid in the construction of railroads that these are present grants.

In Schulenberg v. Harriman, 21 Wall. 44, the Court construing the Act of Congress of June 3, 1856, granting lands to the State of Wisconsin to aid in the construction of railroads therein said:

> "That the Act of Congress of June 3rd, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first Section is 'that there be, and is hereby, granted to the State of Wisconsin.' The third section declares 'that the lands hereby granted to said State shall be subject to the disposal of the legislature thereof,' and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years 'no further sale shall be made and the lands unsold shall revert to the United States.'

> The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made, that is, that the title is transferred to the state. It is true that the route of the railroad for the construction of which the grant was made was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land."

In the case of Railroad Company v. Baldwin, 103 U. S. 426, the Court construing the Act of Congress of July 23, 1866, granting lands to the State of Kansas to aid in the construction of a certain railroad said:

> "The language of the Act here, and of nearly all the Congressional Acts granting lands, is in terms of a grant in praesenti. The Act is a present grant, except in so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted,' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the Act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this Court to similar language in other Acts of Congress."

In Noble v. Logging Company, 147 U. S. 165-176, the Court construing the Act of Congress of March 3, 1875, granting to Railroads the right of way through the public lands of the United States, said:

> "The language of that Section is 'that the right of way through the public lands of the

> United States is hereby granted to any railroad company duly organized under the laws of any State or Territory,' etc. The uniform rule of this Court has been that such an act was a grant in presenti of lands to be thereafter identified."

In New York Indians v. U. S., 170 U. S. 1-17, the Court, passing upon a similar question, said:

> "In the cases arising under the railroad land grants of which Schulenberg v. Harriman, 21 Wall. 44, is a leading one, the language of the granting clause was in the present tense 'there he, and hereby is, granted,' etc., and it has always been held that these were grants in praesenti, although the lands could not be identified until the map of the definite location of the road was filed, when the title, which was previously imperfect, acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here."

It is also so held in the following cases:

Leavenworth, etc., R. Co. v. U. S. 2 Otto, 733.

Railroad Co. v. Alling, 99 U. S. 463-474.

St. Paul & Pacific v. Northern Pacific, 139 U. S. 1.

Railroad Co. v. Jones, 177 U. S. 125.

II.

THE CONDITION THAT WHEN A MAP SHOWING ANY PORTION OF SAID COMPANY'S LOCATED LINE IS FILED, THE COMPANY SHALL COMMENCE GRADING SAID LOCATED LINE WITHIN SIX MONTHS THEREAFTER, OR SUCH LOCATION SHALL BE VOID, CONTAINED IN SECTION THREE OF THE ACT OF 1898, AND THE CONDITION THAT THE RIGHT GRANTED BY SAID ACT SHALL BE FORFEITED UNLESS AT LEAST TWENTY-FIVE MILES OF SAID RAILROAD SHALL BE CONSTRUCTED THROUGH THE INDIAN RESERVATION WITHIN TWO YEARS AFTER THE PASSAGE OF THE ACT, CONTAINED IN SECTION FIVE OF SAID ACT, ARE CONDITIONS SUBSEQUENT, OF WHICH NO ONE CAN TAKE ADVANTAGE BUT THE UNITED STATES, THE GRANTOR.

UNTIL THE UNITED STATES HAS ASSERTED ITS RIGHT TO ENFORCE A FORFEITURE FOR THE BREACH OF THESE CONDITIONS, EITHER BY LEGISLATION DECLARING A FORFEITURE, OR BY JUDICIAL PROCEEDINGS AUTHORIZED BY LAW, THE TITLE REMAINS UNIMPAIRED IN THE GRANTEE.

This Court has so held in numerous cases.

In Schulenberg v. Harriman, 21 Wall. 44, the Court said:

> "The provision in the Act of Congress of 1856 that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed.
>
> And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person, and if they do not see fit to assert

their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the Government;—no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an Act directing the possession and appropriation of the property, or that it be offered for sale or settlement.

In the present case no action has been taken either by legisaltion or judicial proceedings to enforce a forfeiture of the estate granted by the Acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by the location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In Grinnell v. Railroad Company, 103 U. S. 739, the Court passing upon the condition contained in the Act of Congress of June 2, 1864, granting lands to the State of Iowa to aid in the construction of railroads, said:

> "Another point equally fatal to the plaintiffs in error is, that the assertion of right by the United States to the lands in controversy was wholly a matter between the Government and the Railroad Company, or its grantors. The legal title remains where it was placed before the Act of 1864. If the Government desires to be reinvested with it it must be done by some judicial proceeding, or by some Act of the Government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the Government itself can only assert by some direct proceeding."

In Van Wyck v. Kenvals, 106 U. S. 360, the Court said:

> "If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United States, through judicial proceedings, or through the action of Congress * * * A third party cannot take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property."

In St. Louis, etc. Ry. Co. v. McGee, 115 U. S. 469, the Court said:

> "It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law.

> Legislation to be sufficient must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture and a judgment therein establishing the right it should be direct, positive, and free from all doubt or ambiguity."

In Bybee v. Oregon, etc., Rd. Co., 139 U. S. 663, the Court construing the Act of Congress of July 25, 1866, granting lands to aid in the construction of a railroad from Portland, Oregon, to the Central Pacific Railroad, in California, said:

> "The Act making the grant in aid of this road does not in its words of conveyance differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been construed by this Court as taking effect in praesenti, although the particular lands to which the grant is applicable, remain to be selected and identified when the road is located, and the map is filed with the Secretary of the Interior.
>
> And in all cases in which the question has been passed upon by this Court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating ipso facto as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an Act of Congress, resuming title to the lands.
>
> An effort is made to distinguish this case from Schulenberg v. Harriman, in the fact that the Act not only declares that the lands 'shall revert to the United States,' but that the act itself 'shall be null and void,' from which it is argued that it was the intention of Congress that the failure to complete the road should operate ipso facto as a termination of all right to acquire any further interest in any lands

not then patented. It is true that the language of this statute differs somewhat from that ordinarily employed by Congress in connection with similar grants, but the declaration that the lands 'shall revert to the United States' is practically equivalent to a declaration that the Act granting such lands shall cease to be operative if the Company fails to complete its road within a specified time, or as Mr. Justice Field puts it in Schulenberg v. Harriman: 'The provision in the Act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States if the road be not completed is no more than a provision that the grant shall be void if a condition subsequent be not performed.' The title to the land having vested in the Company by virtue of the grant, the provision that it shall complete the road within a certain number of years does not cease to be a condition subsequent by declaring that the Act shall be null and void if the condition be not complied with.

It is not, indeed, always easy to determine whether a condition be precedent or subsequent; it must depend wholly upon the intention of the parties as expressed in the instrument, and the facts surrounding its execution. If the condition does not necessarily precede the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evident that the intention of the parties is that the estate shall vest, and the grantee shall perform the act after taking possession, then the condition is to be treated as subsequent and there is no forfeiture without a re-entry by the grantor, or, in case the State, without some action on its part manifesting an intention to resume its title. In the case under consideration, the act, as already stated, takes effect as a present grant and the provision for a forfeiture in case the Company fails to complete its road is clearly a condition subsequent.

> Upon the whole we think there is nothing to distinguish this case from Schulenberg v. Harriman, and that the learned judge of the court below was correct in holding that the Railroad Company had not forfeited its right to construct its road by failure to complete the same within the time limited."

This case is particularly in point in that it involved the question of the forfeiture of the right of way granted by the Act of 1866 by reason of the failure to construct the railroad within the time specified in the granting act.

The case of Utah N. & C. R. Co. v. Utah & C. Ry. Co. et al., in the Circuit Court for the District of Nevada, 110 Fed. 879, is also particularly in point. In that case the Oregon Short Line and Utah Northern Railway Company had acquired title to a right of way under the provisions of the Act of Congress of March 3, 1875, granting to railroads the right of way through the public lands of the United States, which right of way it had subsequently conveyed to the plaintiff in said action. Section four of the Act of March 3, 1875, provides that if any section of any railroad located thereunder shall not be completed within five years after the location of said section, the rights granted by said act shall be forfeited as to any such uncompleted section of said road. The grantee of the right of way therein had failed to construct its road within the time limited by the act of 1875, and it was contended that because of such failure its rights became ipso facto forfeited and void. The Court held that the condition contained in Section four of the

Act was a condition subsequent, and that the failure to complete the road within the time limited, did not operate as a revocation of the grant, but merely authorized the Government to forfeit it by judicial proceeding or by an Act of Congress resuming title to the land.

In the Court below it was urged that the condition contained in Section three of the Act of 1898 is not a condition subsequent, in that it declares that the location *shall be void* unless the Company shall commence grading the located line within six months after the filing of its map. But the declaration that the location *shall be void* is no more than a declaration that the title which vested upon the location of the railroad shall be divested if the condition be not performed, and as this Court aptly says in Bybee v. Oregon, etc. R. Co., supra, the title having vested in the Company by virtue of the grant upon the definite location of its railroad, the condition that it shall commence grading within six months thereafter does not cease to be a condition subsequent by declaring that the location shall be void if the condition be not performed.

Applying the test laid down in the authorities cited and particularly in the case of Bybee v. Oregon, etc., Ry. Co., supra, it is obvious that the conditions contained in Sections three and five of the Act of 1898 are conditions subsequent. The condition contained in Section three, as well as that contained in Section five of the granting act, follows the vesting of the title and it is manifest that the grantee was not only authorized, but was in fact

required to take possession of the granted premises in order to perform the condition.

No action by the United States to enforce a forfeiture, either by legislation or by judicial proceedings, had by authority of law, has been taken. The title to the right of way granted, therefore, remains unimpaired in the grantee, or in its grantee and successor, the defendant in error, the Washington and Great Northern Railway Company, and plaintiff acquired no right or title to any part of such right of way by the approval of its map of location by the Secretary of the Interior under the Act of March 2, 1899.

The Act of March 2, 1899, is a general act, granting the right of way through Indian Allotments and Indian Lands to any railroad company which complies with its conditions, and the approval by the Secretary of the Interior of a map filed thereunder, is not an assertion by the United States of its right to enforce a forfeiture. It is beyond the power of the Secretary to declare and enforce a forfeiture.

> "In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the Government might declare a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands and sell them."
>
> New York Indians v. United States, 170 U. S. 1.

It is therefore respectfully submitted that the judgment of the Supreme Court of the State of Washington should be affirmed.

THOMAS R. BENTON,
Attorney for Defendants in Error.

SPOKANE AND BRITISH COLUMBIA RAILWAY COMPANY *v.* WASHINGTON AND GREAT NORTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 49. Submitted November 29, 1910.—Decided January 3, 1911.

No one can take advantage of the forfeiture provided for non-performance of a condition subsequent in a land grant *in præsenti*, except the Government, *Schulenberg* v. *Harriman*, 21 Wall. 44; nor can there be any forfeiture on the part of the United States without appropriate judicial proceeding equivalent to office found or legislative assertion of ownership.

Although the grant of right of way involved in this action made by the act of June 4, 1898, c. 377, 30 Stat. 430, provided for grading and completion of a specified number of miles of track, failure to do so did not operate as a forfeiture without action by the Government or render the grant null or void leaving the land open for settlement or location by another railroad.

Whether a granted right of way to a railroad under act of Congress has been abandoned by the grantee or whether the grantee is estopped to make claim thereunder, are not Federal questions and the decision of the state court is not reviewable here.

49 Washington, 280, affirmed.

THE facts, which involve the right of a grantee of lands under the act of June 4, 1898, 30 Stat. 430, are stated in the opinion.

Mr. W. T. Beck, with whom *Mr. W. C. Keegin* was on the brief, for plaintiff in error:

Defendants in error never acquired any vested interest in the right of way. The location of such right of way made and approved under the act of June 4, 1898, was rendered void for failure to commence grading or other

work on such location within six months after the filing of the maps showing such location, as required by § 3 of the act. Congress intended that before the grant should attach, maps showing location must be filed, but such location was to be of no effect without commencement of work. The doing of such things by the grantee was essential to divest the Government of title, and failure made the grant void *ipso facto*. Any other construction is to read a meaning into the statute contrary to its plain language.

The term forfeited implies the extinguishment of a vested grant or interest, or a right thereto.

The fact that words of grant are found in the act of June 4, 1898, does not make the case other than one of statutory construction. Although a statute may contain the elements of a compact between the Government and an individual, nevertheless it should be construed according to the rules for construction of statutes and not according to those for construction of contracts. Black, Interpretation of Laws, p. 315; *Schulenberg* v. *Harriman*, 21 Wall. 44; 5 Thompson on Corp., § 6588.

A strict construction in favor of the Government is demanded by public policy. Sutherland, Stat. Const., § 378; Black, Interpretation, p. 315; *Rice* v. *Minn. & N. W. R. R. Co.*, 1 Black, 358; *Railroad Co.* v. *Litchfield*, 23 How. 66. Acts containing such or other language importing a grant *in præsenti*, have been construed not to be grants *in præsenti*, and *vice versa* acts without any terms of conveyance at all have been construed to be grants *in præsenti*. See *New York Indians* v. *United States*, 170 U. S. 1; *Heydenfelt* v. *Daney G. Mining Co.*, 93 U. S. 634; *United States* v. *Choctaw, A. & G. R. R. Co.*, 3 Oklahoma, 404, 490; *New York R. R. Co.* v. *Boston, Hartford & Erie Ry. Co.*, 36 Connecticut, 196; 5 Thompson, § 6586. The decision of the court below is not supported by *Railroad Co.* v. *Alling*, 99 U. S. 463; *United States* v. *D. & R. G.*

R. R. Co., 150 U. S. 1; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 176.

Without conceding the right of way in question was ever acquired, if acquired, it was abandoned long prior to the deed from the grantee to defendant in error. The facts show non-user and an abandonment. Defendants in error are estopped from claiming this right of way. *Roanoke Inv. Co.* v. *Kansas City R. R. Co.*, 17 S. W. Rep. 1000; *Jones* v. *Van Bochove*, 61 N. W. Rep. 342; *Blakely* v. *Chicago, K. & N. R. R. Co.*, 64 N. W. Rep. 972. An abandonment is more readily presumed where the easement is granted for a public benefit, than where held for private use, and when such right has been abandoned the State may grant it to another. *Henderson* v. *Cent. Pass. Ry. Co.*, 21 Fed. Rep. 358.

Whether the grant be one in fee or an easement merely, it is subject to the condition that it be appropriated and used for the purpose designed. *Denver & R. G. R. R. Co.* v. *Alling*, 99 U. S. 463; *Railroad Co.* v. *Baldwin*, 103 U. S. 426. The defendant in error is bound by the abandonment of its predecessor. *Westcott* v. *New York & N. E. R. R. Co.*, 25 N. E. Rep. 840.

Justice favors the position of plaintiff in error. *White's Bank* v. *Nichols*, 64 N. Y. 74.

Mr. Thomas R. Benton, with whom *Mr. Wm. R. Begg* was on the brief, for defendant in error:

When the line of the proposed railway was definitely located, and a map thereof filed with and approved by the Secretary of the Interior, the title to the lands granted vested in the grantee as of the date of the granting act. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *Noble* v. *Logging R. R. Co.*, 147 U. S. 165, 176; *New York Indians* v. *United States*, 170 U. S. 1, 17. See also *Leavenworth &c. R. R. Co.* v. *United States*, 92 U. S. 733; *Railroad Co.* v. *Alling*, 99 U. S. 463, 474;

St. Paul & Pacific R. R. Co. v. *Northern Pacific R. R. Co.*, 139 U. S. 1; *Railroad Co.* v. *Jones*, 177 U. S. 125.

The conditions that when a map showing any portion of said company's located line is filed, the company shall commence grading said located line and complete portions within specified periods are conditions subsequent, of which no one can take advantage but the United States, and until the United States has asserted its right to enforce a forfeiture for the breach of these conditions, either by legislation declaring a forfeiture, or by judicial proceedings authorized by law, the title remains unimpaired in the grantee. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Van Wyck* v. *Knevals*, 106 U. S. 360; *St. Louis &c. Ry. Co.* v. *McGee*, 115 U. S. 469; *Bybee* v. *Oregon R. R. Co.*, 139 U. S. 663; *Utah N. & C. R. R. Co.* v. *Utah & C. Ry. Co.*, 110 Fed. Rep. 879.

Mr. Justice Day delivered the opinion of the court.

In this case the Spokane and British Columbia Railway Company, plaintiff in error, began an action in the Superior Court of the State of Washington for Ferry County to enjoin the Washington and Great Northern Railway Company, the Washington Improvement and Development Company and others from interfering with the use of a certain right of way for railway purposes through the Colville Indian Reservation in the State of Washington, which, it was alleged, belonged to the plaintiff. The plaintiff had judgment in its favor in the Superior Court. Upon proceedings in error the judgment was reversed and a judgment entered in favor of the present defendants in error, defendants below. 49 Washington, 280. To that judgment a writ of error was sued out from this court.

The case presents a conflict between the right of way of the Spokane and British Columbia Railway Company

and a right of way theretofore granted by the United States to the Washington Improvement and Development Company, grantor of the Washington and Great Northern Railway Company. The case is stated in the Supreme Court of Washington as follows:

"By an act of Congress approved June 4, 1898, there was granted to the appellant Washington Improvement and Development Company, and to its assigns, a right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation, beginning on the Columbia River near the mouth of the Sans Poil River, running thence northerly through said reservation toward the international line. There was also granted grounds adjacent for the purposes of stations, other buildings and side tracks, and switch tracks. The act provided for the filing of maps showing the route when determined upon, said maps of definite location to be approved by the Secretary of the Interior. These maps were subsequently filed, and were approved by the Honorable Secretary prior to November 27, 1899. Before the commencement of this action the Washington Improvement and Development Company transferred all of its rights, privileges and immunities acquired under this act of Congress to the appellant Washington and Great Northern Railway Company. Since the filing and approval of the maps of definite location as aforesaid this respondent [plaintiff in error here], acting under authority of the act of Congress of March 3, 1875, and the act of Congress of March 2, 1899, located a route for its railway over practically the same line indicated by the maps filed by the Washington Improvement and Development Company, as aforesaid, and filed its maps with the Secretary of the Interior, who approved the same on October 17, 1905. The act of June 4, 1898, under which appellants [defendants in error here] claim, contained the following provision:

"'Provided, That when a map showing any portion of said railway company's located line is filed herein, as provided for, said company shall commence grading said located line within six months thereafter or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before the construction of any such section shall be begun.'

"Section 5 of the statute reads as follows:

"That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this act.'

"Neither the Washington Improvement and Development Company nor its successor, the Washington and Great Northern Railway Company, commenced grading within six months after the approval of its maps of definite location, nor did it construct twenty-five miles of railroad, nor any, within two years after the passage of the act. For these reasons the respondent claims that appellant's location of the strip indicated by its map became void and forfeited, and that respondent had a right to go upon the same strip of land and survey and locate its line of railway; that having surveyed and marked out its proposed line of railway upon substantially the same strip of ground after the expiration of two years, and its said maps of location having been approved by the Secretary of the Interior, respondent claims that its location thereupon is legal, and that appellants have no rights whatever in the premises, and should be enjoined from in any manner interfering (which appellants were doing) with the respondent's use and occupancy thereof."

From this statement it is apparent that the case turns upon the rights of the defendants in error, the Washington and Great Northern Railway Company, in the right of way, as the successor of the Washington Improvement and Development Company, in view of the facts just stated.

The grant to the Washington Improvement and Development Company, to it and its assigns, by the act of Congress of June 4, 1898 (c. 377, 30 Stat. 430), was of the right of way for its railway, telegraph and telephone lines in and through the Colville Indian Reservation in the State of Washington, and its language is:

"That there is hereby granted to the Washington Improvement and Development Company, a corporation organized and existing under the laws of the State of Washington, and to its assigns, a right of way for its railway, telegraph and telephone lines through the Colville Indian Reservation in the State of Washington."

A description of the right of way is inserted, and in § 3 of the act it is provided that maps of the route of its located lines through the reservation shall be filed in the office of the Secretary of the Interior, and after the filing of the maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company; the act then cites the proviso already quoted from the opinion of the Supreme Court of Washington, requiring the company to commence grading the located lines within six months "or such location shall be void."

Section 4 authorized the company to enter upon the reservation for the purpose of surveying and locating the line.

Section 5 provided that the right therein granted should be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of the act.

As found by the Supreme Court of Washington, the grading was not begun within the six months provided, nor was twenty-five miles of said railroad constructed through the reservation within two years after the passage of the act, as provided in § 5.

Subsequently the maps of location of the plaintiff in error were approved by the Secretary of the Interior, and the contention is on its behalf that the rights of the defendant in error, as successor of the original grantee, had terminated because of the failure to keep the conditions of the granting act. On the part of the defendant in error it is contended that inasmuch as the grant was *in præsenti*, and there has been no subsequent act of Congress or direct proceeding in behalf of the United States to forfeit the title of the grantee, its rights are unimpaired and superior in the conflicting right of way to those of the plaintiff in error.

The Supreme Court of Washington, reviewing the decisions in this court, was of opinion that the rights granted in the act of June 4, 1898, had not been forfeited and inured to the benefit of the Washington and Great Northern Railway Company as successor of the Washington Improvement and Development Company.

This court has had frequent occasion to consider acts of this character, and a brief review of its decisions will, we think, establish the rule to be applied. The leading case is *Schulenberg* v. *Harriman*, 21 Wall. 44. In that case there was an act of Congress making a grant of lands conditioned that all lands remaining unsold after ten years should revert to the United States. It was there held that notwithstanding this condition, no one could take advantage of its non-performance except the grantor or his heirs, or the successors of the grantor, if the grant proceeded from an artificial person, and that unless such persons asserted the right to forfeiture, the title remained unimpaired in the grantee; and it was further held that if the grant be a public one, the right to forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership for the breach of the condition. This doctrine was approved

in *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Van Wyck* v. *Knevals*, 106 U. S. 360, and *St. Louis &c. Ry. Co.* v. *McGee*, 115 U. S. 469.

In *New York Indians* v. *United States*, 170 U. S. 1, this court, after referring to *Schulenberg* v. *Harriman*, 21 Wall. 44, said:

"It has always been held that these were grants *in præsenti*, although the lands could not be identified until the map of definite location of the road was filed, when the title which was previously imperfect acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here."

In *Bybee* v. *Oregon &c. Railroad Co.*, 139 U. S. 663, the grant provided that not only the lands should revert to the United States for failure to perform the conditions, but the grant itself should be null and void for noncompliance with the conditions. It was nevertheless held that the conditions were subsequent, and the title could not be forfeited except upon proper proceedings by the Government, judicial in their character, or an act of Congress competent for that purpose.

Applying the principles of those cases to the grant in question, we find that in its terms the granting clause is clear and distinct and conveys an estate *in præsenti*. There is nothing in the conditions inconsistent with the vesting of the title, or requiring things to be done before the title can be vested. The company is required to commence grading its located line within six months and the grant is to be forfeited, unless at least twenty-five miles shall be constructed within two years after the passage of the act. These things may be done after the vesting of the title, and do not necessarily precede the vesting of the estate.

Reading this grant in the light of the former adjudications of this court, we think it must be held that it was

the intention of Congress that the grantee should perform these conditions after acquiring title and taking possession, and therefore that the conditions were subsequent. This being true, there could be no forfeiture on the part of the United States without some appropriate judicial or legislative action, which it is not claimed was taken in this case. We think the Supreme Court of the State of Washington was right in its construction of the grant under the circumstances shown.

The contention that the grant was abandoned by the grantee, or that the circumstances show estoppel to make claim under it, do not present questions reviewable here. The state court having, in our view, properly decided the Federal question made, upon which this court alone could take jurisdiction, its judgment must be

Affirmed.